Miranda warnings are admissible if voluntary." *United States v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003). However, the "joint venture" doctrine is an established exception to this rule. The Second Circuit provides that "statements elicited during overseas interrogation by foreign police in the absence of *Miranda* warnings must be suppressed whenever United States law enforcement agents actively participate in questioning conducted by foreign authorities." *Id.*

The Ninth Circuit additionally concluded that under this doctrine "evidence obtained through activities of foreign officials, in which federal agents substantially participated and which violated the accused's Fifth Amendment or *Miranda* rights, must be suppressed in a subsequent trial in the United States." *Pfeifer v. U.S. Bureau of Prisons*, 615 F.2d 873, 877 (9th Cir. 1980). "Active" or "substantial" participation refers to evidence wherein the United States "encouraged, requested, or participated in [suspect's] interrogation or written statement." *Yousef*, 327 F.3d at 144-145. We have not been provided sufficient evidence that American officials "actively" or "substantially" participated in the South Sudanese questioning. The United States government was only informed of an inquiry *after* it had occurred. As such, al-Hazimi has failed to demonstrate that the South Sudanese questioning rises to the level of a "joint venture."

The questions posed to the petitioner by the team of FBI investigators while aboard the American aircraft were admissible as they did not fall within the public safety exception to the *Miranda* warnings. Additionally, al-Hazimi's statements, or references to such statements, to South Sudanese representatives should be admitted into evidence as he has failed to establish a "joint venture" between the foreign government and that of the United States.

For these reasons, we AFFIRM.

JUSTICE KAGAN, with whom JUSTICE SOTOMAYOR joins, dissenting.

The issue at hand today serves to prove that Justice Marshall's deep concerns regarding the public safety exception, as expressed in his perturbed dissenting opinion in *Quarles*, were correct. The majority rejects al-Hazimi's challenge to suppress statements made to the team of FBI investigators aboard an American aircraft under the public safety exception articulated in *Quarles*. In doing so, the majority has endorsed a sweeping interpretation of the exception, illustrative of the very chaos Marshall alluded would occur as a result of the expansiveness of the public safety exception. *Quarles*, 467 U.S. at 679.

I.

The original interpretation of the public safety exception, as set forth in *Quarles*, maintains significant flaws in application. Justice Marshall noted that "disagreements of the scope of the "public-safety" exception and mistakes in its application are inevitable." *Id*. at 680. The majority's decision today exacerbates these mistakes by grossly expanding the exception. While already expansive, the facts at hand extend the limits of the public safety exception far beyond its current restrictions. The interrogation occurred 20 days following the attack in question and lasted 14 hours. In doing so, the court only further destroys any remaining "clarity of *Miranda* for both law enforcement officers and members of the judiciary." *Id*. at 679. Similar to the *Quarles* majority, the government faintly contends that in withholding *Miranda* warnings, the team of FBI investigators were able to extract information from al-Hazimi they might not have had he been advised of this right. *Id*. at 685.

I do not intend to suggest that there are absolutely no instances wherein law enforcement officers in the face of an immediate threat cannot question suspects without providing the *Miranda* warnings. Even Justice Marshall's *Quarles* dissent did concede the importance of an exception with regards to immediate threats, offering the example of a bomb. Marshall stated "if a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights." *Id*. at 686. Rather, I am deeply concerned that the

court's decision today broadens the scope of the public safety exception beyond recognition and appropriate application.

Beyond this deeply concerning expansion, the majority gravely misapplies the public safety exception with respect to the facts at hand. As originally described in *Quarles*, the majority described the necessity for the lack of sufficient *Miranda* warnings; "Officer Kraft needed an answer to his question not simply to make his case against Quarles but to ensure that further danger to the public did not result from the concealment of the gun in a public area." *Id.* at 657.

The court placed significant emphasis on the time involved in such decisions, stating "we decline to place officers such as Officer Kraft in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the Miranda warnings." *Id.* The team of FBI investigators interrogated al-Hazimi aboard an American aircraft for 14 hours – a period far exceeding the mere seconds in *Quarles*. As such, the majority grossly misrepresents the immediacy requirement of the public safety exception.

Additionally, the court mistakenly dismisses the petitioner's parallel to the Sixth Circuit's decision in *Hodge*. In *Hodge*, the court emphasized the fact that "the relatively limited inquiry [the officers] made was appropriately tailored to the information they possessed." *Hodge*, 714 F.3d at 387. The 14-hour long interrogation at issue was not limited in its inquiry, as provided evidence establishes that the conversation was in reality "wide-ranging." In applying the logic of *Hodge*, the team of FBI investigators' questions were not appropriately tailored to the information they possessed. As such, the court gravely errs in permitting the admission of the statements aboard the aircraft.

The majority additionally blunders in determining the facts to be especially similar to those in *Spoerke*. There is in actuality a significant distinction that directly impact the admissibility of al-Hazimi's statements to FBI investigators. The court dismissed the petitioner's argument that the whole

of the FBI investigators' inquiries were not truly "designed to discern the threat the bombs presented" to the public, given the lengthy period of time that had passed since the original attack. *Spoerke*, 568 F.3d at 1249. The majority reaches this conclusion after being persuaded that the team's questions were aimed to discover whether or not al-Hazimi had knowledge of other explosives that posed significant threats to the public.

However, the actual inquiries at hand and in *Spoerke* are significantly different. In *Spoerke*, the officer physically saw "two duct-taped balls with a green string attached, which he suspected to be improved explosive devices." *Id*. at 1241. After noticing these items, Officer Haugh asked what they were. Spoerke replied "that they were "pipe bombs" that they "liked to throw…in canals and watch explode." *Id*. This confirmation led the officer to further inquire about the materials used to build these explosive devices. *Id*. These questions were specific and explicit in their aim to "discern the threat the bombs presented." *Id*. at 1249. While we do not have a direct transcript of the 14-hour-long aerial interrogation, the lengthy duration indicates that it is not possible that every single one of the investigators' questions was specific and explicit in discerning the threat al-Hazimi posed to the public.

II.

Beyond the public safety exception, the majority additionally erroneously concluded that the South Sudanese inquiry of al-Hazimi did not constitute a "joint venture" between foreign interrogators and United States law enforcement officers. In describing the doctrine, the court fails to note the existence and significance of *United States v. Emery*, a similar case that established the existence of a joint venture. *United States v. Emery*, 591 F.2d 1266 (9th Cir. 1978).

In determining "substantial" participation, the Ninth Circuit points to the fact that associated Drug Enforcement Administration (D.E.A.) agents "alerted the Mexican police of the possible activity" and "supplied the pilot for the plane." *Id*. at 1268. With respect to the issue at hand, South Sudanese representatives alerted American officials of their findings, with the U.S. providing an

aircraft. The majority certainly cannot intend to suggest that requirements for "active" or "substantial" participation hinge on *which* country does *which* action. Rather, we should be focused on the fact that any action or coordination took place at all. In a broader sense, "the constitutional safeguards of *Miranda* should not be circumvented merely because the interrogation was conducted by foreign officials in a foreign country." *Id.*

Today, the court extends the scope of the public safety exception far beyond recognition. For decades, the foundation on which the *Miranda* warnings stand has stated that in order "to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Miranda*, 384 U.S. at 467. In denying al-Hazimi's request to suppress statements made to FBI officials without such warnings, these very grounds have been dismantled. Despite the court's decision today, the privilege against self-incrimination "applies to all individuals," even those accused of the most heinous and horrifying crimes, such as acts of terrorism. *Id.* at 472. For these reasons, I respectfully dissent.

Applicant Details

First Name	**Justine**
Last Name	**Huang**
Citizenship Status	**U. S. Citizen**
Email Address	**justine.huang.2024@lawmail.usc.edu**
Address	**Address** **Street** **15210 Cambridge St** **City** **Tustin** **State/Territory** **California** **Zip** **92782** **Country** **United States**
Contact Phone Number	**9494418804**

Applicant Education

BA/BS From	**Wellesley College**
Date of BA/BS	**May 2019**
JD/LLB From	**University of Southern California Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90513&yr=2009**
Date of JD/LLB	**May 12, 2024**
Class Rank	**Not yet ranked**
Law Review/ Journal	**Yes**
Journal(s)	**Southern California Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning Organization**

Recommenders

Klerman, Lisa
lklerman@law.usc.edu
Craig, Robin
rcraig@law.usc.edu
(213) 821-8153
Clifton, Richard
Judge_Clifton@ca9.uscourts.gov
808-522-7474

This applicant has certified that all data entered in this profile and any application documents are true and correct.

JUSTINE HUANG

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June 22, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

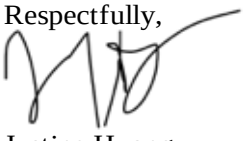
Dear Judge Walker:

I am a rising third-year law student at the University of Southern California Gould School of Law (USC) seeking a clerkship position in your chambers for the 2024 term. I learned about this opportunity through the Just the Beginning Organization, and my externship in the Ninth Circuit Court of Appeals last summer confirmed my interest in a judicial clerkship. I am particularly interested in clerking at the federal district court and was drawn to the opportunity to learn from your experiences as a judge as well as your prior experiences in public service.

My experiences externing for Judge Richard Clifton, where I drafted three bench memos and memorandum dispositions, and writing my Note, which has been selected for publication in the *Southern California Law Review*, have honed my legal research, writing, and analytical skills. In my legal writing course, I received a perfect score on an objective memorandum assignment and a top score in oral arguments. This summer I am a law clerk at the U.S. Department of Justice Environmental Enforcement Section and look forward to further developing my legal research and writing skills related to litigation. As I plan to pursue public interest environmental law, I would be especially interested in any environmental law cases in your docket. In addition, as part of the USC Gould Mediation Clinic, where I mediated various small claims cases around Los Angeles County, my conflict resolution skills and ability to see both sides of an issue will translate well into my ability to objectively analyze legal issues as a law clerk.

My resume, unofficial transcript, writing sample, and three letters of recommendation are submitted with this application. I would welcome the opportunity to meet with you at your convenience. Thank you for your time and consideration—it would be an incredible honor to support your important work.

Respectfully,



Justine Huang

JUSTINE HUANG

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EDUCATION

University of Southern California Gould School of Law
Juris Doctor Candidate, May 2024, Cumulative GPA: 3.59; GPA: 3.73 (second year)

Awards:	2023 Chao-Fujioka Family Scholarship for Public Law/Government Service
Activities:	Senior Editor, Southern California Law Review
	Note selected for publication in the *Southern California Law Review*, titled "*Shelby County* to Clean Air Act: Evaluating the Constitutionality of California's Clean Air Act Waiver Under the Equal Sovereignty Doctrine"
	President, Energy & Environmental Law Society
	Communications Chair, Public Interest Law Foundation
High Honors Grades:	Legal Research, Writing and Advocacy; Environmental Law; Torts
Honors Grades:	Admin Law; Civil Procedure; Con Law: Structure; Business Organizations; Evidence

Wellesley College
Bachelor of Arts, *cum laude,* Economics*,* May 2019, GPA 3.64

Honors:	Barbara Barnes Hauptfuhrer '49 Scholar Athlete Award
Activities:	Co-Captain, Varsity Tennis; Piano Recital, Music Performance Program
Study Abroad:	St. Catherine's College, University of Oxford

LEGAL EXPERIENCE

California Office of Attorney General — Los Angeles, CA
Extern, Natural Resources Law Section — Commencing August 2023

U.S. Department of Justice, Environment and Natural Resources Division — Washington D.C.
Law Clerk, Environmental Enforcement Section — Commencing May 2023

USC Gould Mediation Clinic — Los Angeles, CA
Volunteer Mediator — September 2022 – May 2024
Mediate small claims cases in Los Angeles County Superior Court on a weekly basis. Use conflict resolution techniques to resolve disputes involving landlord/tenant, contract, and consumer/merchant matters.

U.S. Court of Appeals for the Ninth Circuit — Honolulu, HI
Judicial Extern to the Honorable Richard R. Clifton — June 2022 – July 2022
Conducted legal research and drafted bench memoranda, memorandum dispositions, and comment memoranda in a variety of appellate cases involving immigration, criminal, disability, and environmental law.

OTHER EXPERIENCE

Law School Toolbox, LLC — Remote
Content Writer — September 2021 – Present
Draft monthly blog content on various topics that aims to demystify the law school experience and help students succeed in law school, published on The Law School Toolbox and The Girl's Guide to Law School sites.

Industrial Economics, Inc. — Cambridge, MA
Senior Research Analyst — December 2020 – July 2021
Research Analyst — August 2019 – November 2020
Supported environmental enforcement work for attorneys at the U.S. EPA. Researched and drafted memoranda, conducted responsible party searches for leaked underground storage tanks (USTs), and investigated a scrap metal recycling company with prior Clean Air Act violations which contributed to the EPA's $500,000 settlement.

SKILLS: Mandarin (conversational proficiency), Spanish (reading and writing proficiency), Microsoft Excel (advanced)

INTERESTS: Tennis, classical piano, blogging, hiking, traveling, national parks

On-line Academic Student Information System

USC University of Southern California

OASIS Unofficial Transcript

ID#: 9396896334

askUSC Knowledge Base Start Here

Last Name	First Name
Huang	Justine

Unofficial Transcript

Current Degree Objective

	Degree Name	Degree Title
MAJOR	Juris Doctor	Law

Cumulative GPA through 20231

	Uatt	Uern	Uavl	Gpts	GPAU	GPA
UGrad	0.0	0.0	0.0	0.00	0.0	0.00
Grad	0.0	0.0	0.0	0.00	0.0	0.00
Law	60.0	59.0	59.0	187.00	52.0	3.59
Other	0.0	0.0	0.0	0.00	0.0	0.00

Fall Term 2021

Course	Units Earned	Grade	Course Description
LAW-515	3.0	3.9	Legal Research, Writing, and Advocacy I
LAW-509	4.0	3.9	Torts I
LAW-503	4.0	3.1	Contracts
LAW-502	4.0	3.8	Procedure I

Spring Term 2022

Course	Units Earned	Grade	Course Description
LAW-531	3.0	3.3	Ethical Issues for Nonprofit, Government and Criminal Lawyer
LAW-516	2.0	3.7	Legal Research, Writing, and Advocacy II
LAW-504	3.0	3.1	Criminal Law
LAW-508	3.0	3.5	Constitutional Law: Structure
LAW-507	4.0	3.2	Property

Fall Term 2022

Course	Units Earned	Grade	Course Description
LAW-768	2.0	CR	Law Review Writing
LAW-767A	0.0	IP	Law Review Staff
LAW-608	4.0	3.7	Evidence
LAW-603	4.0	3.7	Business Organizations
LAW-630	4.0	CR	Mediation Clinic I

Spring Term 2023

Course	Units Earned	Grade	Course Description
LAW-767B	1.0	CR	Law Review Staff
LAW-789	3.0	3.4	Race, Racism and the Law
LAW-777	4.0	3.8	Administrative Law and Regulatory Policy
LAW-655	3.0	4.0	Environmental Law
LAW-631	4.0	3.8	Mediation Clinic II

June 22, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to provide an enthusiastic recommendation for Justine Huang, who is applying for a clerkship in your chambers. Justine is an exceptional candidate. After being selected for admission into the highly competitive Clinic, she went on to excel in every aspect of her work. The Clinic is a "working" class that operates essentially as a mediation firm. For that reason, I am uniquely positioned to evaluate students as if they were attorney colleagues.

As part of their work in the Clinic, the students mediate actual disputes between parties, helping them to analyze their claims and find creative solutions in order to avoid lawsuits. Successful student mediators – such as Justine -- are eligible to matriculate to the Advanced Mediation Clinic in their third year of law school, where they officiate over increasingly sophisticated mediations, often where the parties are represented by counsel.

One of the reasons behind Justine's success in the Clinic is her ability to quickly grasp previously unfamiliar subjects and topics and to talk cogently and persuasively when discussing options for the mediation participants. She is thoughtful, analytical, and adaptable. She also brings a congenial attitude and dedication to her work, including when confronting difficult and contentious litigants. Ever the consummate professional, Justine is able to handle emotional parties and guide participants to a settlement outcome that appeals to both sides. She is sensitive to cultural differences, and deals with challenges appropriately and professionally.

Her personality traits make her an ideal colleague in the workplace as well as in the classroom. She is easy to get along with, and everyone in the clinic class enjoyed working with her.

As a former federal law clerk myself nearly three decades ago, I know how important it is to have someone in the role who is conscientious and committed. No matter what she is taking on, Justine can always be counted upon to be punctual, prepared, and diligent. Equally important is her talent as a writer, which is a critical skill for a law clerk.

If you have any questions about Justine, please do not hesitate to contact me. Please feel free to call me on my cell phone – (310) 386-9612 – or my home phone – (310) 544-6773.

Sincerely,

Lisa Klerman

Clinical Professor of Law
Director of the Mediation Clinic
USC Gould School of Law

June 22, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my great pleasure to recommend Justine Huang for a judicial clerkship in your chambers, to begin in late summer or fall 2024. Ms. Huang is a second-year student here at the University of Southern California (USC) Gould School of Law, and I have known her since she joined my "Biodiversity and the Law" reading group in the summer before her 1L year. Since that initial interaction, Ms. Huang has been a student in my Spring 2023 Environmental Law course; I supervised her student note for the Southern California Law Review; I have worked with Ms. Huang during her tenure as President of the Energy & Environmental Law Society, for which I am the Faculty Advisor; and I have acted as a regular advisor and sounding board for Ms. Huang as she pursues her legal goals.

Ms. Huang is a mature and energetic writer and researcher. For example, she received a "High Honors" grade in Legal Research, Writing, and Advocacy as a 1L, meaning that her abilities were at the very top (usually top student) in that class. More recently, her law review note, "Shelby County to Clean Air Act: Evaluating the Constitutionality of California's Clean Air Act Waiver Under the Equal Sovereignty Doctrine," explored two complicated areas of law: California's exceptionalism under the federal Clean Air Act (the statute I personally consider, by far, to be the most complex in environmental law); and the barely-developed Equal Sovereignty Doctrine that the U.S. Supreme Court most prominently used to invalidate portions of the Voting Rights Act in its Shelby County decision. With, frankly, relatively little help from me, Ms. Huang carefully articulated the Equal Sovereignty Doctrine test and applied it to California's ability to seek a waiver from the Clean Air Act's normal emissions standards for new motor vehicles and trucks. California has been using this waiver provision since the early 1970s, first to deal with pervasive smog problems but more recently to impose greenhouse gas emissions limitations and requirements for zero-emissions vehicles. These most recent uses have led to litigation challenging the continuing constitutionality of the waiver provision on grounds that California is the only state afforded that privilege. Ms. Huang not only clearly articulated and applied the federal law test, she also researched and expertly summarized 50 years of California's use of the waiver provision. Her note was appropriately long, but also clear and comprehensible. I was pleased but not surprised when it was selected for publication in the Southern California Law Review. The final version is due in a few weeks (June 2023), so I hope it will be in print by the time she graduates in May 2024.

Ms. Huang's research and writing skills were also at work in my Environmental Law class, where she earned a solid 4.0 "A" grade. Environmental Law is an intense statutory course, akin to Income Tax—although arguably harder because we covered four federal pollution control statutes, requiring students to master four very different statutory and regulatory regimes. Students also learn a good deal of statutory interpretation and administrative law in my class. As part of their preparation for real-world environmental law, I give them two take-home exams and several written assignments over the course of the semester. The assignments require students to use the U.S. Environmental Protection Agency's various databases, such as EJ (Environmental Justice) Mapper, to explore places that are important to them. The take-home exams pose real-world problems without clear answers that students must analyze in 12- and 15-page memoranda. Ms. Huang tackled all of these with thoughtful and thorough analyses, never missing a deadline and keeping up high scores throughout the semester.

Thus, I have seen firsthand Ms. Huang's excellent skills in legal research, analysis, and writing. Moreover, those skills have been recognized by others. For this summer (2023), Ms. Huang accepted a highly prestigious law clerk position in Washington, D.C., with the U.S. Department of Justice in their Environmental and Natural Resources Division. More impressively, however, she was also offered positions with the California Office of Attorney General and the Natural Resources Defense Council. True to her desire to acquire as much experience as possible, Ms. Huang will be externing with the California Office of Attorney General in Fall 2024 and hopes to extern with the Natural Resources Defense Council in Spring 2024.

While environmental and natural resources law is clearly one of Ms. Huang's strong interests, she has also wanted to pursue a judicial clerkship since her first year of law school. That goal is one reason she worked in the summer after her 1L year as a judicial extern for the Honorable Richard R. Clifton at the U.S. Court of Appeals for the Ninth Circuit. There she gained experience drafting bench memoranda and memorandum dispositions in a variety of federal law cases, including criminal law cases and immigration, disability, and environmental law civil cases. Notably, she has received Honors grades in Civil Procedure Constitutional Law, and Evidence (among other courses), indicating her affinity for court procedure.

Ms. Huang is also one of the most organized and productive law students I have ever met in my 25 years of law teaching. I first met Ms. Huang over Zoom in the summer of 2021, as the "Biodiversity of the Law" 1L Reading Group met electronically to informally discuss a variety of fun topics, from de-extincting woolly mammoths to CRISPR and climate change adaptation. When meetings moved in person during the fall, attendance tapered off—but not for Ms. Huang! She was one of five students (out of a starting group of 12) that not only continued to meet through October (when the reading group ended), but also helped to organize a reunion in April 2022 to celebrate the end of the students' first year.

This last year (2022-2023) was even more impressive. In addition to her normal course load, Ms. Huang was President of the Energy & Environmental Law Society, leading a seven-member Executive Board in organizing 11 events for law students,

Robin Craig - rcraig@law.usc.edu - (213) 821-8153

including the first-ever Gould-organized trip to the California Lawyers Association's Environmental Law@Yosemite Conference (where USC was the third-most represented law school); volunteering to mediate, on a weekly basis, small claims cases in the Los Angeles Superior Court through Gould's Mediation Clinic; writing a publishable law review note; serving as Senior Editor for the Southern California Law Review; drafting monthly blog posts for law students for The Law School Toolbox and The Girl's Guide to Law School; and serving as Communications Chair for the Public Interest Law Foundation.

Finally, Ms. Huang—Justine—is simply a wonderful person to work with. She has endless good humor to balance her drive to achieve and passion for excellence. She is an excellent listener and problem solver, traits that undoubtedly contribute to her success in the Mediation Clinic. She also lives a deep commitment to the public interest, seeking to increase Asian-American representation in environmental and natural resources law and to correct environmental (and other) injustices.

In short, I recommend Justine Huang without reservation for a judicial clerkship in your chambers. Please do not hesitate to contact me if I can be of further assistance.

Sincerely yours,

Robin Kundis Craig
Robert C. Packard Trustee Chair in Law
USC Gould School of Law
699 Exposition Blvd.
Los Angeles, CA 90089
Phone: 213-821-8153
E-Mail: rcraig@law.usc.edu

Re: **Letter of Recommendation for Justine Huang**

I am pleased to offer a strong recommendation in support of the application of Justine Huang, who served as a judicial extern for me during summer 2022, after she finished her first year as a student at the University of Southern California Gould School of Law.

Justine was assigned primary responsibility within my office for five cases. I ask externs to do the same work that law clerks in my chambers do, albeit on cases that at first glance seem less complicated. For three of the cases, she prepared comprehensive bench memos that were circulated to all three judges on the panel. For those cases, after the panel agreed with the recommendations in her bench memo, she subsequently prepared draft dispositions. For the other two cases, she prepared shorter comment memos for me. For all of the cases she identified and assembled copies of specific parts of the record, statutes, cases, and other materials for my review and preparation. We also discussed the cases in preparation for oral argument and again after argument and the judges' conference.

Her work was of very high quality. I provide externs with detailed written comments on draft bench memos. The first paragraph of my comments on his first draft memo illustrate how exceptionally well I think she did: "Outstanding draft bench memo. I doubt that I have ever reviewed a draft bench memo for an extern's first case that was any better, and not often a draft by a law clerk for the clerk's first case. This may not have been the most challenging case in terms of the outcome – I've already vented my frustration about the poor quality of [plaintiffs'] briefs – but the context was not simple and involved an area of law I assume unfamiliar to you. The analysis is logical and persuasive. The memo is well organized and well written. This is a great work product." I then offered a few editorial or form comments, to which she responded well in a second draft.

Her later draft bench memos drew similar evaluations from me. In all three cases, I circulated the memos to the other judges in the form of slightly revised second drafts. In all three cases. the other judges agreed with the recommendations contained in Justine's memos, and the panel entered dispositions largely in the form she drafted and presented to me for circulation.

As I mentioned, the cases assigned to externs in my chambers are the ones that we think will turn out to be less challenging. That assessment was correct for the cases assigned to Justine. I regret that I do not have memory of the cases themselves sufficient to permit me to comment further on them. My experience may not permit me to say how she would do with the most complicated cases, but she had a

very positive attitude and strong work ethic, and she handled subjects previously unfamiliar to her very well, so I expect that she would do well with those tougher cases.

On a personal level, Justine was easy to work with, responded well to questions and suggestions, and got along well with others in chambers. I enjoyed working with her and think she has a bright future.

If there is further information I can provide or if there is anything you would like to discuss with me, please do not hesitate to contact me by phone (808-522-7474) or email (richard_clifton@ca9.uscourts.gov)

Very truly yours,

Richard R. Clifton
U.S. Circuit Judge

O:\Letters\Recommendations\Jacob Kamstra recommendation 2023-05-16.wpd

JUSTINE HUANG

1180 W. 29th St., Apt 102 • Los Angeles, CA 90007 • (949) 441-8804 • justine.huang.2024@lawmail.usc.edu

Writing Sample

The below writing sample is an internal bench memorandum I drafted last summer (2022) during my judicial externship for Judge Richard Clifton in the Ninth Circuit Court of Appeals. The bench memorandum provides a recommendation on the case. This case entailed a native and citizen of Mexico who illegally entered the U.S. twice and was reinstated for removal. The asylum officer determined that Petitioner failed to establish a reasonable fear of persecution based on a protected ground or torture in Mexico. Petitioner then requested that an Immigration Judge (IJ) review this negative determination. At the beginning of the IJ hearing, Petitioner requested a continuance to obtain an attorney. The IJ denied his request as Petitioner had appeared with counsel at a bond hearing held earlier that day, and subsequently affirmed the asylum officer's negative reasonable fear determination. Petitioner appealed the IJ's decision.

I primarily drafted this memorandum, reviewed and lightly edited by a law clerk and Judge Clifton. The "Factual and Procedural History" has been omitted in this submission to reduce the sample's length. Since this sample contains confidential information, I have redacted the case name and replaced the Petitioner's name with "Petitioner" throughout, and obtained consent from Judge Clifton to use this memorandum as a writing sample.

BENCH MEMORANDUM

TO: Judge Clifton
FROM: Justine Huang, Law Extern
DATE: July 25, 2022
RE: *[Case Name Redacted]*
Appeal From: Immigration Judge
Jurisdiction (Appellate): 28 U.S.C. § 1252(a)(1)
Case Weight: 3
Notice of Appeal Filed: *[Date Redacted]* (timely)
Recommendation: Deny petition for review

OVERVIEW

Petitioner, a native and citizen of Mexico who illegally entered the United States twice and was reinstated for removal in 2019, petitions for review of the decision by the Immigration Judge (IJ) affirming the asylum officer's determination that Petitioner failed to establish a reasonable fear of persecution or torture.

Petitioner alleges that (1) the IJ denied him due process of law by denying his request for a continuance to obtain counsel at his reasonable fear review hearing, (2) he established a reasonable fear of torture under the Convention Against Torture (CAT) as he would be targeted and tortured upon removal by gang members for money, and (3) the IJ failed to make a reasoned statement for denying relief. I recommend that the panel deny Petitioner's petition for review.

QUESTIONS PRESENTED AND SHORT ANSWERS

I. Did the Immigration Judge (IJ) violate Petitioner's right to due process by denying him a continuance to obtain counsel? [*Pages 3-7*]

No. The IJ did not violate Petitioner's statutory right to counsel in his reasonable fear review proceeding because Petitioner was advised of his right to counsel, secured counsel for an earlier hearing the same day, was provided a reasonable opportunity to obtain counsel within the ten days allowed by 8 C.F.R. § 208.31(g), and failed to explain how a continuance would allow him to return with counsel within the ten-day period.

II. Does substantial evidence support the Immigration Judge's determination that Petitioner failed to establish a reasonable fear of torture? [*Pages 7-9*]

Yes. The IJ reasonably determined that Petitioner failed to establish a reasonable fear of torture because he was never physically harmed nor directly threatened in Mexico and based his fear on generalized violence and crime. Further, he has not shown any reason to believe that Mexican authorities would seek to torture him or acquiesce to his torture.

III. Did the Immigration Judge err by considering only past torture in the CAT analysis and/or by failing to provide a reasoned statement or analysis? [*Pages 9-10*]

No. The IJ provided a reasoned explanation in the record that did not solely consider past torture to be the basis for CAT relief and adequately explained why Petitioner failed to establish a reasonable fear of torture. Further, Petitioner failed to demonstrate sufficient evidence indicating the reasonable possibility of future torture and failed to explain what evidence the IJ failed to consider regarding the possibility of future torture.

STANDARDS OF REVIEW

The court reviews de novo whether the statutory right to counsel was violated. "Whether [an] IJ's denial of a continuance violated [a petitioner's] statutory right to counsel . . . is a question of law which we review de novo." *Montes-Lopez v. Holder*, 694 F.3d 1085, 1088 (9th Cir. 2012).

The court reviews for substantial evidence the factual findings underlying the IJ's determination that an applicant is not eligible for protection under the CAT. *Lalayan v. Garland*, 4 F.4th 822, 840 (9th Cir. 2021). Substantial evidence means that "we must uphold the IJ's conclusion that [petitioner] did not establish a reasonable fear of torture unless, based on the evidence, any reasonable adjudicator would be compelled to conclude to the contrary." *Bartolome v. Sessions*, 904 F.3d 803, 811 (9th Cir. 2018) (citations and quotation marks omitted).

DISCUSSION

I. Did the Immigration Judge violate Petitioner's right to due process by denying him a continuance to obtain counsel?

Non-citizens have a constitutional and statutory right to counsel in removal proceedings. "Although there is no Sixth Amendment right to counsel in an immigration hearing, Congress has recognized it among the rights stemming from the Fifth Amendment guarantee of due process that adhere to individuals that are the subject of removal proceedings." *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004). However, making a Fifth Amendment claim to a right to counsel requires Petitioner to show that his proceeding before the IJ "was so

fundamentally unfair that [he] was prevented from reasonably presenting his case," which would require him to demonstrate both procedural error and prejudice. *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999).

A. Statutory Right to Counsel and *Orozco-Lopez*

Petitioner primarily argues on appeal that the IJ's denial of his request for a continuance to obtain an attorney at the reasonable fear hearing violated his statutory right to counsel under 8 U.S.C. § 1362. **OB 8; AR 6–7.** A non-citizen "denied the statutory right to be represented by counsel in an immigration proceeding need not also show that he was prejudiced by the absence of the attorney." *Montes-Lopez v. Holder*, 694 F.3d at 1090–94.

Petitioner argues that non-citizens subject to expedited removal have a statutory right to counsel at their reasonable fear review hearings before an IJ, citing *Zuniga v. Barr*, 946 F.3d 464, 469 & n.8 (9th Cir. 2019). **OB 6–7.** However, *Orozco-Lopez*, 11 F.4th 764, 775 (9th Cir. 2021), notes that *Zuniga*'s holding is not so broad. In *Zuniga*, the question was whether "non-citizens *subject to expedited removal under 8 U.S.C. § 1228* have a statutory right to counsel in reasonable fear proceedings before immigration judges." 946 F.3d at 465 (emphasis added). 8 U.S.C. § 1228 only governs the "[e]xpedited removal of aliens convicted of committing aggravated felonies." 8 U.S.C. § 1228(B)(4)(B); *Orozco-Lopez*, 11 F.4th at 775. Nevertheless, "[t]he broader legislative context . . . supports the conclusion that there is a right to counsel in reasonable fear proceedings." *Zuniga*, 946 F.3d at 469.

Orozco-Lopez clarifies that Petitioner has a statutory right to counsel. The right to counsel is codified at 8 U.S.C. § 1362, which provides that "[i]n any removal proceedings before an immigration judge," non-citizens "shall have the privilege of being represented" by counsel of their choosing. 8 U.S.C. § 1362. *Orozco-Lopez* holds that under 8 U.S.C. § 1362, "any removal

proceedings" include reasonable fear hearings before an IJ. 11 F.4th at 777. Thus, non-citizens whose removal orders have been reinstated are statutorily entitled to counsel under 8 U.S.C. § 1362 at their reasonable fear hearings before an IJ. *Id.* at 780.

However, this statutory right to counsel is cabined by 8 C.F.R. § 208.31(g)'s requirement that in the absence of exceptional circumstances, the reasonable fear review hearing shall be conducted by the IJ within ten days of the filing of the Notice of Referral to the Immigration Judge. 8 C.F.R. § 208.31(g); *Orozco-Lopez*, 11 F.4th at 777. This does not require a non-citizen to have counsel before an IJ can proceed, but only that a non-citizen must be informed of the entitlement to counsel and have an opportunity to seek counsel within ten days of filing the Notice of Referral to Immigration Judge. *Orozco-Lopez*, 11 F.4th at 778–79.

B. Supplemental Briefing

Petitioner argues he was denied his statutory right to counsel when he was denied a continuance to retain counsel within the ten-day period set out in 8 C.F.R. § 208.31(g). **Pet'r SB 2.** He argues that the IJ should have continued the case for one day to allow him to obtain counsel within the constraints of 8 C.F.R. § 208.31(g). **Pet'r's Resp. to Resp't SB 2.**

A non-citizen may waive the right to counsel, but such waiver must be knowing and voluntary. *Tawadrus*, 364 F.3d at 1103. The IJ must "(1) inquire specifically as to whether petitioner wishes to continue without a lawyer; and (2) receive a knowing and voluntary affirmative response." *Id.* (internal citations omitted).

Here, Petitioner may have given a knowing and voluntary waiver of his right to counsel. When the IJ inquired whether Petitioner wanted an attorney, Petitioner appeared to indicate in the affirmative but did not explain why he did not have counsel for this hearing. **AR 6–7.** After the IJ communicated that he needed to have obtained counsel ahead of time, Petitioner said

"Okay" and did not object, proceeding with the hearing. **AR 6–7.** Even if Petitioner did not give a knowing and voluntary waiver of his right to counsel, the IJ is not obligated to grant indefinite continuances if a non-citizen doesn't produce counsel but refuses to waive his right. *Tawadrus*, 364 F.3d at 1103. When a petitioner does not waive the right to counsel, IJs "must provide [petitioner] with reasonable time to locate counsel and permit counsel to prepare for the hearing." *Arrey v. Barr*, 916 F.3d 1149, 1158 (9th Cir. 2019) (quoting *Biwot v. Gonzales*, 403 F.3d 1094, 1098–99 (9th Cir. 2005)). What is considered a "reasonable time" depends on several factors, including "the realistic time necessary to obtain counsel; the time frame of the requests for counsel; the number of continuances; any barriers that frustrated a petitioner's efforts to obtain counsel, such as being incarcerated or an inability to speak English; and whether the petitioner appears to be delaying in bad faith." *Arrey*, 916 F.3d at 1158. A petitioner is not denied the right to counsel where continuing the hearing would be futile or where the IJ has done everything reasonably possible to permit the petitioner to obtain counsel. *Id.*

The IJ gave Petitioner reasonable time to locate counsel and Petitioner did not show good cause for a continuance. In *Orozco-Lopez*, the Ninth Circuit held that the statutory right to counsel was denied to one party (Orozco-Lopez) because the IJ did not mention the possibility of legal representation at the hearing, but not denied to the other party (Gonzalez) because "he had the opportunity to retain counsel and failed to do so, and his other challenges are without merit." 11 F.4th at 779–80. Here, Petitioner's case is distinguishable from Orozco-Lopez's situation because the IJ directly asked him about having an attorney at the hearing. **AR 6.** Petitioner's case is more similar to Gonzalez's situation. While Petitioner was not granted any prior continuances and expressed a desire to be represented, he had retained an attorney earlier that day in the bond hearing, which showed he had a reasonable amount of time to communicate with his prior lawyer

or find a new lawyer. **AR 6–7.** He did not address the IJ's direct questions or provide a basis for dissatisfaction with his bond hearing lawyer or other reason he was unable to obtain an attorney. **AR 6–7.** At the time of the hearing, he had been living in the U.S. for nine years, had been counseled before his interview with the asylum officer, and had at least a week to secure counsel for this hearing. **AR 23, 33, 34.** He did not indicate he was trying to find another attorney nor demonstrate diligent efforts to contact or secure an attorney. **AR 6–7.** He also failed to explain how he planned to obtain an attorney in one day, especially as the next day, January 1, was a holiday. **AR 6–7.** Petitioner is not detained or incarcerated, **OB 2,** and had a Spanish translator present during the hearing. **AR 5**. He was given a list of attorneys and notified about his right to counsel prior to the hearing. **AR 21, 23, 34**; *see United States v. Moriel-Luna*, 585 F.3d 1191, 1201–02 (9th Cir. 2009) (holding that the IJ reasonably concluded that one week was a reasonable amount of time for petitioner to find counsel because the IJ informed petitioner of his right to counsel, provided him with a list of legal-services organizations, and petitioner did not indicate he had tried to find an attorney). Thus, I recommend affirming that Petitioner's statutory right to counsel was not violated when the IJ denied the continuance in his proceeding.

II. Does substantial evidence support the Immigration Judge's determination that Petitioner failed to establish a reasonable fear of torture?

In order to remain eligible for withholding of removal, Petitioner must show a reasonable fear that he would either be 1) persecuted on account of a protected ground or 2) tortured with the acquiescence of a public official in Mexico. *See* 8 C.F.R. § 208.31(c); 8 C.F.R. § 1208.18(a)(1). Petitioner primarily argues on appeal that he has established a reasonable fear of torture; hence, I focus my analysis on the torture element. **OB 10–12.**

Article 3 of the CAT prohibits states from returning anyone to another country when there are "substantial grounds" for believing he or she may be tortured. *See* United Nations

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), G.A. Res. 39/46, U.N. Doc. A/39/51 (1984); Pub. L. 105-277 (1998). Torture can be inflicted "for any reason based on discrimination of any kind." 8 C.F.R. § 1208.18(a)(1). Protection under the CAT requires two elements: "first, is it more likely than not that the alien will be tortured upon return to his homeland; and second, is there sufficient state action involved in that torture." *Benedicto v. Garland*, 12 F.4th 1049, 1063 (9th Cir. 2021) (citations and quotation marks omitted); *see* 8 C.F.R. § 1208.16(c)(2).

The first element requires that an applicant demonstrate "a chance greater than fifty percent that he will be tortured" if removed. *Hamoui v. Ashcroft*, 389 F.3d 821, 827 (9th Cir. 2004). Petitioner argues that he would be targeted and tortured by gangs if sent back to Mexico. **OB 12.** In 2010, Petitioner survived a potential mugging in Tijuana, Mexico and witnessed a shootout which led him to reenter the U.S. **AR 7–9.** He testified that he feared he would be kidnapped, extorted, or killed by gang members seeking money from newly deported immigrants. **AR 13, 41.** However, he did not know anyone specifically looking for him, instead basing his fear on what he had seen and heard in the news. **AR 41.** Petitioner was never harmed or directly threatened in Mexico. **AR 14, 37.** He testified only that his father had been extorted and on one occasion threatened, and the company president who extorted his father later ended up in prison. **AR 9, 11–14, 16, 38–43.** Generalized evidence of violence and crime in Mexico is not particular to Petitioner and does not satisfy the standard of proof. *See Delgado-Ortiz*, 600 F.3d 1148, 1152 (holding that general violence and crime in Mexico associated with drug trafficking and cartels is insufficient to establish that it is "more likely than not" petitioners would be tortured); *Ruiz-Colmenares v. Garland*, 25 F.4th 742, 751 (9th Cir. 2022) (denying petitioner's CAT claim because petitioner's past robberies over twenty years ago were instances

of general crime that do not amount to past torture). Thus, I conclude Petitioner failed to demonstrate it is "more likely than not" he will be subject to torture if removed.

The second element requires that the torture be "inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1). "Acquiescence" by government officials requires "actual knowledge or willful blindness." 8 C.F.R. § 1208.18(a)(7). Here, Petitioner did not show a reasonable fear that he would be tortured with the acquiescence of a public official in Mexico. Neither he nor his family have had any trouble with Mexican authorities other than witnessing their solicitation of bribes. **AR 16, 42.** He testified that he does not fear harm from Mexican public officials or anyone affiliated with the Mexican government and does not know whether such officials would protect him if they knew he were being harmed. **AR 15–16, 42.** He has not shown any reason to believe that Mexican authorities would seek to torture him or acquiesce to his torture. **AR 18.** Thus, I recommend affirming that substantial evidence supports the IJ's determination that Petitioner failed to establish a reasonable fear of torture.

III. Did the Immigration Judge err by considering only past torture in the CAT analysis and/or by failing to provide a reasoned statement or analysis?

Petitioner argues on appeal that he established a successful case for protection under the CAT based on fear of future torture and the IJ misapplied the law by limiting consideration of Petitioner's CAT application to only past torture, denying him due process of law. **OB 13–14.** Petitioner also alleges that the IJ failed to make a reasoned statement for denying relief. **OB 14.**

When evaluating an application for CAT relief, the IJ should consider "all evidence relevant to the possibility of future torture," including evidence of past torture inflicted upon the applicant; evidence that the applicant could relocate to a part of the country of removal where he

or she is not likely to be tortured; evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and other relevant information regarding conditions in the country of removal. 8 C.F.R. § 1208.16(c)(3). "[T]he IJ must consider all relevant evidence; no one factor is determinative." *Maldonado v. Lynch*, 786 F.3d 1155, 1164 (9th Cir. 2015). In addition, due process and precedent require a "minimum degree of clarity" in dispositive reasoning and in the treatment of a properly raised application for relief. *She v. Holder,* 629 F.3d 958, 963 (9th Cir. 2010).

Petitioner alleges that the IJ's decision failed to properly evaluate his CAT claim. However, IJs presiding over reasonable fear hearings in reinstatement proceedings "do not have the ability nor are they required to provide detailed decisions outlining all the claims raised by the alien." *Bartolome*, 904 F.3d at 813–14. Further, the IJ provided a more detailed explanation of her decision in the record, including that Petitioner "has not suffered harm rising to the level of persecution or torture. There is no reason to believe that the authorities are looking for [Petitioner] or interested in [him] in order to torture him or that they would turn a blind eye if someone else did." **AR 18.** This adequately incorporated evidence relevant to the possibility of future torture and explained why Petitioner failed to establish a reasonable fear of torture. Petitioner failed to demonstrate that the record compels a finding of the reasonable possibility of future torture and failed to explain what evidence the IJ failed to consider that is relevant to the possibility of future torture. Thus, I recommend affirming that the IJ did not err in its CAT analysis nor fail to provide a reasoned statement and analysis.

CONCLUSION

For the foregoing reasons, I recommend that the panel deny Petitioner's petition for review.

Applicant Details

First Name	**Diego**
Middle Initial	**G**
Last Name	**Huerta**
Citizenship Status	**U. S. Citizen**
Email Address	**dgh46@georgetown.edu**
Address	**Address** Street **423 9th St. NE** City **Washington** State/Territory **District of Columbia** Zip **20002** Country **United States**
Contact Phone Number	**5206035707**

Applicant Education

BA/BS From	**University of Arizona**
Date of BA/BS	**May 2021**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**June 5, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Environmental Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Argentieri, Sabrina
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Pasachoff, Eloise
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202-661-6618
Krisnakumar, Anita
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

Honorable Judge Jamar Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

Thank you for the opportunity to apply for a clerkship in your chambers. I am applying to this position because I would like to contribute to the work you do and deepen my understanding of the federal courts. I believe that I am a good candidate for this position due to my strong academic background, diverse set of career experiences, and passion for justice.

During my time at the University of Arizona, I maintained perfect grades and studied environmental and natural resource law. I also worked in a variety of scientific fields and developed the critical thinking skills necessary to succeed as a scientist. In graduate school, I produced an extensive master's thesis, and developed community outreach materials explaining complex scientific findings to a lay audience.

In law school, I have engaged deeply with the theory and practice of law. I have taken and succeeded in many classes critical to the work courts do every day, such as constitutional law, administrative law, statutory interpretation, and evidence. I am also a member of the Georgetown Environmental Law Journal, which has significantly improved my writing skills and understanding of environmental issues.

During my time working at the EPA and the DOJ, I have learned a great deal about prosecuting and defending civil actions in the enforcement and rulemaking context, honed my attention to detail, and developed my legal reasoning skills. This experience is invaluable to my understanding of the courts and has led to a strong interest in how courts manage cases and reach their decisions.

Given my experience in both scientific and legal research and writing, as well as my performance in law school, I believe that I have a lot to contribute to this clerkship. Federal courts are important to me not just as forums for the practice of environmental law, but as guardians of civil order. I am excited for any opportunity to become more familiar with them.

Sincerely,
Diego Huerta

Diego Huerta

(520) 603-5707 | diegohuerta@email.arizona.edu

Education

Georgetown Law School **Washington, DC**
J.D. Law Expected May 2024
GPA: 3.83

University of Arizona **Tucson AZ**
M.S. Environmental Science August 2021
GPA: 4.00

Experience

U.S. DOJ, Environmental and Natural Resources Division **Washington D.C.**
Law Clerk Summer 2023

- Writing/reviewing court filings and legal research memos in cases defending environmental rulemakings and government facilities.
- Opportunities for trial preparation, Clean Water Act enforcement work, and deposition review.

U.S. EPA, Office of Civil Enforcement, Air Enforcement Division **Washington, D.C.**
Honors Law Clerk Summer 2022 - Fall 2022

- Drafted motions, referrals, and legal/scientific research.
- Reviewed inspection materials and prepared inspection report material.
- Participated in EPA training and talks, observed meetings within EPA and settlement discussions with regulated entities.

Georgetown Environmental Law Journal **Washington, D.C.**
Staff/Executive Editor Sept 2022 - Present

- Reviewing and editing citations, proofing academic articles, and writing blog posts and student note.
- Will correspond directly with authors and manage staff in 2023-2034 school year

Integrated Environmental Science and Health Risk Lab **Tucson, AZ**
Undergraduate/Graduate Researcher January 2019 -May 2021

- Wrote undergraduate thesis on national, binational, and international legal

frameworks surrounding binational sewage spill.
- Wrote master's thesis containing risk assessment literature review
- Compared soil, water, plant, and settled dust metal(loid) concentrations with relevant CALEPA, FAO-WHO, USDA, HUD, and EPA primary and secondary contamination standards and screening levels.

Dr. Matthew Goode **Tucson, AZ**
Undergraduate Researcher May 2017 - September 2020
- Presented at local and national natural resource conferences.
- Contributed to writing of internal reports and prepared manuscript on rattlesnake activity modeling for publication.
- Wrote and edited student posts and information for the lab website.

The USA National Phenology Network **Tucson, AZ**
UA NASA Space Grant Intern October 2018 - May 2019
- Performed literature review, data collection and analysis, and modeling of invasive plant phenology in support of agency outreach and public facing data products.
- Contributed edits to staff publication and produced internal white paper reviewing invasive species phenology information.

The Office of Congressman Raúl Grijalva **Tucson, AZ**
Intern Summer 2017
- Performed constituent casework intake and support, liasoning with numerous federal agencies on behalf of citizens.

Publications

Diego Huerta, et al., (2023). Probabilistic risk assessment of residential exposure to metal(loid)s in a mining impacted community, *Science of The Total Environment*, https://doi.org/10.1016/j.scitotenv.2023.162228

Alma Anides Morales, Diego Huerta, Monica Ramirez-Andreotta. (2023, pre-print). Measuring Behavior and Risk Perception to Inform Children's Exposure Assessments and Communication Strategies, http://dx.doi.org/10.21203/rs.3.rs-433981/v1

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Diego G. Huerta
GUID: 843023513

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	001	95	Civil Procedure David Vladeck	4.00	A	16.00	
LAWJ	002	51	Contracts Michael Diamond	4.00	A	16.00	
LAWJ	003	52	Criminal Justice Louis Seidman	4.00	A	16.00	
LAWJ	005	51	Legal Practice: Writing and Analysis Frances DeLaurentis	2.00	IP	0.00	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	48.00	4.00
Cumulative	12.00	12.00	48.00	4.00

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	004	95	Constitutional Law I: The Federal System Paul Smith	3.00	A-	11.01	
LAWJ	005	51	Legal Practice: Writing and Analysis Frances DeLaurentis	4.00	B+	13.32	
LAWJ	007	95	Property John Byrne	4.00	A	16.00	
LAWJ	008	95	Torts Kevin Tobia	4.00	A-	14.68	
LAWJ	025	50	Administrative Law Eloise Pasachoff	3.00	A-	11.01	
LAWJ	611	06	World Health Assembly Simulation: Negotiation Regarding Climate Change Impacts on Health Kathryn Gottschalk	1.00	P	0.00	

Dean's List 2021-2022

	EHrs	QHrs	QPts	GPA
Current	19.00	18.00	66.02	3.67
Annual	31.00	30.00	114.02	3.80
Cumulative	31.00	30.00	114.02	3.80

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	121	09	Corporations Donald Langevoort	4.00	A	16.00	
LAWJ	1472	05	Energy Law and Policy Kathryn Zyla	2.00	A	8.00	
LAWJ	1491	07	Externship I Seminar (J.D. Externship Program) Deborah Carroll		NG		
LAWJ	1491	131	~Seminar Deborah Carroll	1.00	A-	3.67	
LAWJ	1491	133	~Fieldwork 3cr Deborah Carroll	3.00	P	0.00	
LAWJ	1552	05	Business and Capitalism James Feinerman	1.00	A-	3.67	
LAWJ	1782	08	Statutory Interpretation Theory Seminar Anita Krishnakumar	2.00	A	8.00	
LAWJ	304	05	Legislation Josh Chafetz	3.00	A-	11.01	

In Progress:

	EHrs	QHrs	QPts	GPA
Current	16.00	13.00	50.35	3.87
Cumulative	47.00	43.00	164.37	3.82

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	146	08	Environmental Law	3.00	A	12.00	
LAWJ	1611	05	Administrative Law and Public Administration Seminar	3.00	A-	11.01	
LAWJ	165	09	Evidence	4.00	A	16.00	
LAWJ	1816	05	Breaking Privilege: An In-Depth Analysis of Privilege Issues in the Context of Civil Litigation Valerie Ramos	1.00	P	0.00	
LAWJ	1827	08	Wildlife and Ecosystems Law	2.00	A	8.00	
LAWJ	215	05	Constitutional Law II: Individual Rights and Liberties	4.00	A-	14.68	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	17.00	16.00	61.69	3.86
Annual	33.00	29.00	112.04	3.86
Cumulative	64.00	59.00	226.06	3.83

End of Juris Doctor Record

Unofficial

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C., 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

June 12, 2023

Re: Clerkship Recommendation for Diego Huerta

Dear Judge:

I am writing to highly recommend Diego Huerta for a clerkship. I was fortunate to be Diego's supervisor throughout his internship in the Air Enforcement Division (AED) of the Environmental Protection Agency during the summer and fall of 2023, and I wholeheartedly attest that his legal skills and acumen and work ethic are stellar. I have worked with at least 75 interns over my 25-year tenure with EPA and Diego easily stands out as one of my top five.

While Diego worked for me at EPA's Air Enforcement Division, he displayed such a high level of competence and integrity that I offered him the unusual opportunity of taking on projects as if he was a staff attorney. One such project involved the development of a novel legal enforcement tool to address a significant nationwide environmental problem. After a thorough review of the assigned matter, including discussions with EPA scientists and the Office of General Counsel, he conducted research to determine a path forward, and developed an approach to allow AED to begin addressing the issue. Then he drafted a detailed memorandum to aid AED in executing the approach after his internship had ended.

Diego also accomplished with excellence a number technically complex assignments for others in my division in high-profile enforcement cases. He was able to jump into a difficult litigation with a refinery and review the evidence and prepare comprehensive evidence charts for four claims. He mastered the underlying law under a tight timeframe and was highly complimented for his work by the Senior Attorney at the Department of Justice in charge of the case. In addition, he drafted a complaint for a complicated vehicle emission certification case, as well as drafted a motion in limine and proposed joint stipulations in an administrative case involving vehicle emission control defeat devices. He also documented violations of the defeat device prohibition by searching through voluminous website sales data and social media accounts. An AED attorney mentoring Diego with the work cited above, Mark Palermo (now Chief of the Vehicle and Engine Branch) indicated:

> He did all of this with precision, gusto, little need for direction, and with incredible speed. He can gain understanding and be ready to complete assignments involving novel legal issues and technically complex case facts

> remarkably fast. He is an excellent writer and has all the requisite skill to be a highly successful attorney. He is not afraid to ask questions and is thoroughly dedicated to do the work necessary to master anything he is asked to accomplish. Finally, he clearly has the passion for environmental law and policy, a sharp intellect, impeccable integrity, and a highly congenial personality. I believe he is going to grow much further in these strengths as he gains experience in the practice of law.

Another attorney Diego worked with, Adrienne Trivedi, praised his work drafting a Clean Air Act judicial referral report to the DOJ on an oil and gas production case that has challenging legal issues. Adrienne indicated:

> Diego did great work. In helping me draft the referral, he was inquisitive, paid careful attention to detail (even identifying a calculation error), eliminated redundancies, ensured consistency with a national model and a related referral already submitted, followed up timely with me throughout the assignment, and was very pleasant to work with.

Finally, one of our top environmental engineers was very pleased to have Diego's invaluable assistance on data management and analysis associated with an extensive inspection of a prominent retailer:

> During the summer of 2022, Diego Huerta played a critical support role in assisting with EPA's inspection of vehicles and engines. Diego created and organized over 50 individual product inspection case files, transcribed hand-written inspection data from the field into a consolidated worksheet, filled in necessary data gaps, and essentially compiled most of the information which turned into the final inspection report. Diego also assisted in compiling publicly available compliance certification information for those vehicles/engines which were found with a label. Diego followed each task instruction well, completed each assignment in a timely fashion, and communicated well by seeking clarification when necessary and in delivery final work products. As a result of Diego's support, EPA was able to uncover over 50,000 claims for suspect uncertified vehicles/engines. I would recommend considering Diego as a sharp new addition to your team.

Diego exhibited remarkable professionalism and efficiency for a law student, as well as produced an enormous quantity of high-quality work given his short time with us. He had a very heavy workload during a very difficult and unprecedented time — transitioning from a global pandemic where many federal employees, such as myself, were working in separate, isolated locations. Yet he was able to complete all his assigned matters with an impressive level of excellence. Diego had the confidence to take the initiative to seek out a varied caseload and readily took on projects involving areas of law for which he had no experience and yet displayed the unusual ability to take command of the subjects. Diego's training in environmental science was also a significant benefit to AED, where engineers and attorneys usually work as a team on cases. As a

key member of one workgroup, Diego researched the central issue of CAA New Source Review applicability. In conducting this research, Diego was not only called upon to analyze statutory and regulatory language, but also delve deeply into technical aspects of applicability. He even discovered a potentially major source of emissions that the technical members of the workgroup had originally discounted. As part of this research, Diego contacted and consulted with persons involved with rulemaking as well as state and industry representatives to complete a comprehensive write up of the rule's operation and implementation. In working with the state, Diego successfully navigated local sunshine regulations. And, as the lead law clerk, he worked with another clerk to develop the anticipated defenses to further what AED expects to be a very politically difficult investigation. I have every confidence that Diego's work will help to navigate the expected difficulties.

Diego is a true team member. For example, when Diego already had a full caseload working for another attorney in AED, he stepped up to take on a last-minute fire drill to aid in the drafting of a rule in conjunction with Office of Air and Radiation. Diego thoroughly researched and wrote an eight-page memorandum on the logical outgrowth test in the context of a proposed rulemaking under the American Innovation and Manufacturing Act. His recommendations were critical in helping to determine the scope of the draft proposed rule.

Diego proved himself to have a sharp intellect, discerning judgment, good humor, meticulous organization, and unparalleled legal research and analytical skills. It was a true pleasure to work with him and I do not hesitate at all to state that he will be a highly valued member of any legal team. I expect a great future for Diego.

Please feel free to contact me if you have any questions: (202) 564-8953.

Sincerely,

Sabrina Argentieri

Sabrina Argentieri, Attorney Advisor
Stationary Source Enforcement Branch
Air Enforcement Division

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to write this letter of recommendation on behalf of **Diego Huerta, Georgetown Law '24**, who has applied to you for a clerkship. Diego is a strong writer with a personable demeanor and a wry sense of humor. He would meaningfully contribute to the analytic work of chambers while being an easygoing, playful presence. I have enjoyed working with him in two classes, and I recommend him highly.

I first got to know Diego when he enrolled in my 75-person Administrative Law course during the spring of his 1L year. Although I did not get to know him well during that semester, I was impressed by his engaging attitude when I cold called him. He wrote a very strong exam, earning an A- for his consistently good work on questions about justiciability, procedural compliance, judicial review, and constitutionality.

Where I got to know Diego much better is through his work in my much smaller 18-person seminar on Administrative Law and Public Administration. During class discussions, he routinely laid the groundwork for the key points of debate, often taking a provocative position on the assigned reading while finding engaging points of nuance. He and another classmate often had opposing viewpoints on the reading, and the dynamic between the two of them was admirable. They listened to each other and defused what could have been tension with humor and careful listening. The rest of the class typically used these two poles to reason through with each other what they themselves thought about the topic. By the end of the discussion, we had often found a place of agreement buried deep within the seeming contrast. This work suggests to me that Diego would play a constructive role working through briefs and opposing arguments in chambers.

In addition to providing a place to discuss the assigned reading, this seminar is also a writing-intensive course in which students submit three online posts connecting the assigned reading to their developing paper projects and then write a paper of at least six thousand words, meeting with me multiple times over the semester one-on-one to discuss a paper proposal, outline, and draft. Each student also writes a memorandum on one other student's draft paper, providing helpful comments on structure, writing, and analysis.

Diego did a consistently wonderful job on all of these tasks. He wrote a very strong paper on the Environmental Protection Agency's use of Supplemental Environmental Projects as part of the agency's enforcement mission. His writing was engaging and easy to follow, with a well-organized structure and clear analysis. I recommended that he work though one more round of revisions and then submit it for publication as a Note. He also wrote a very helpful memo to another classmate working on an environmental issue, proposing sensible and manageable changes for the classmate to implement in revision. Here, too, this work bodes well for both writing and collaboration as a law clerk.

Diego grew up in Arizona with a strong interest in science and the outdoors. He spent over a decade with a youth outdoor education program, first as a youth participant himself and then ultimately as a board member. He also earned a master's in environmental science at the University of Arizona. The child of two lawyers (Georgetown Law alums themselves who work on criminal defense and habeas in capital cases, respectively), Diego eventually came to see law as the arena in which he would use his scientific and environmental interests to pursue meaningful work. A member of the Georgetown Environmental Law Journal, Diego has interned with the EPA's Office of Civil Enforcement, and he will spend his 2L summer as an intern in the Department of Justice's Environmental and Natural Resources Division. I anticipate that Diego has a future in public service ahead of him. I also anticipate that everyone who works with Diego will find it an enjoyable experience.

I would be happy to discuss Diego's application with you further, so please do not hesitate to reach out. In the meantime, I will reiterate my enthusiastic support for his candidacy.

Very truly yours,

Eloise Pasachoff
Agnes Williams Sesquicentennial Professor of Law

Eloise Pasachoff - eloise.pasachoff@law.georgetown.edu - 202-661-6618

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It gives me great pleasure to recommend Diego Huerta, who has applied to serve as a law clerk in your chambers. Diego is incredibly smart, highly motivated, and hard-working—a top-notch student and citizen. I believe he would make an excellent law clerk and urge you to interview and hire him.

I got to know Diego over the 2022-2023 academic year, when he was a student in my Statutory Interpretation Theory seminar. The seminar had only 22 students and involved a lot of in-class discussion as well as written student critiques of papers, books, and articles, so I had many opportunities to engage in in-depth discussions with the students. Diego's written comments about the assigned class readings were among the best in the class—thoughtful, inquisitive, and appropriately skeptical at times. Both in his written work and in his in-class comments, Diego displayed an unusual ability to distill the assigned reading down to its most critical core and to synthesize and draw comparisons across different weeks' readings. He also provided valuable insights and commentary about the methodology used for papers that involved empirical analysis. It was a pleasure to have Diego in class—he was always well-prepared and engaged—and added an important perspective to class discussions.

Beyond his excellence in the classroom, Diego is a valued member of the Georgetown Law community. This past year, he served on the Georgetown *Environmental Law Journal*, and he will be its Executive Editor next year. Diego also spent this past fall working at the EPA's Office of Civil Enforcement, while maintaining stellar grades and serving on the *Environmental Law Journal*.

As you may notice from his resume, Diego's background is a little unusual for a law student. He is a scientist, with a degree in environmental science and several years' experience working in labs and performing scientific research. He also has published two articles about pollution exposure in scientific journals. And before law school, he served for several years as a youth mentor for experiential environmental education programs. As his background suggests, Diego is committed to using his law degree to work on environmental issues—and has already made significant headway down this path with his summer positions at EPA and DOJ.

In short, I believe that Diego would make a wonderful law clerk—he is incredibly intelligent, diligent, reliable, and hard-working. If you give him the opportunity, I have no doubt that he will be a valued colleague. He is an excellent student and human being, and I expect that he will have a very successful legal career. I hope that he gets the chance to begin it by working for you.

Thank you for considering this recommendation, and please let me know if I can provide any additional information about Diego that would assist you.

Sincerely,

Anita S. Krishnakumar
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Deliberate Indifference? The Tenth Circuit's Misguided Views on Farmer

Diego Huerta

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The attached writing sample is an academic article prepared during the Georgetown Law Journal Write On Competition. Research outside the provided cases was prohibited. No edits have been made.

I. Introduction

A. Holding

The Supreme Court has made clear that deliberate indifference on the part of officials to a risk of serious harm to an inmate violates the Eighth Amendment.[1] In *Farmer*, the Court clarified that under the Eighth Amendment, the test for whether a government official was deliberately indifferent to a risk required a showing that an official was subjectively aware of the risk, not just that the behavior was objectively indifferent.[2] While the Eighth Amendment applies only to convicted persons, after *Farmer* lower courts held that the same standard applied to pretrial detainees under the Due Process Clause of the Fourteenth Amendment.[3]

Here, Plaintiff-Appellant sued county officials and medical staff under a theory of deliberate indifference in United States District Court, arguing that under the Supreme Court's holding in *Kingsley v. Hendrickson*,[4] the test for deliberate indifference in the Fourteenth Amendment context was changed from subjective to objective and that they should therefore prevail on their claim of deliberate indifference. The case was dismissed for failure to state a claim and appealed to the United States Tenth Circuit Court of Appeals under the same theory.[5]

The Tenth Circuit distinguished *Kingsley*, reasoning that the subjective component of a deliberate indifference claim was nonetheless required by stare decisis and textual analysis.[6] The court therefore found that the trial court properly dismissed the claims against all officials for failing to allege the subjective component of deliberate indifference.[7]

B. Background

The morning after his booking, pretrial detainee Thomas Pratt told jail officials he was experiencing alcohol withdrawal.[8] A day after that, he was placed on seizure precautions and prescribed medication to treat his symptoms.[9] However at 2:00 a.m. the following day his health was deteriorating.[10] The nurse examining Pratt did not contact a physician as directed by an assessment tool and did not take Pratt's vitals, but merely switched his medication.[11]

When Pratt was assessed by a doctor eight hours later he had a cut on his forehead and blood had pooled on the floor of his cell but the doctor did not provide care. [12] Later, a nurse noted that Pratt needed assistance with daily activities but she and others who evaluated Pratt did not escalate his level of care.[13] At 1:00 a.m. the next day, a detention officer found Pratt lying motionless in his bed.[14] Pratt had suffered a heart attack and was left permanently disabled.[15]

C. Roadmap

While the Tenth Circuit panel was correct that it was bound by its own precedent, it is not bound by Supreme Court precedent and should give serious consideration to the adoption of an objective test for deliberate indifference claims en banc. First, this Comment will argue that the Tenth Circuit was correct that *Kingsley* did not speak clearly to whether their objective test extended to other kinds of claims under the Fourteenth Amendment. Second, this Comment will argue that the Tenth Circuit misread precedents and performed poor analysis to conclude a subjective standard was required, and that *Farmer* does not control the standard for deliberate indifference under the Fourteenth Amendment. Third, this Comment will argue that an objective test has significant advantages over a subjective one and the overruling of the subjective test should be given serious consideration by the Tenth Circuit.

II. Analysis

A. The 10th circuit was correct that Kingsley did not speak clearly to the standard for deliberate indifference claims and was thus constrained by Tenth Circuit precedent.

The language of *Kingsley* does not clearly delineate the kinds of cases in which it is precedential. Consequently, circuit courts have split on whether to apply *Kingsley*'s subjective standard to deliberate indifference claims.[16] Furthermore, circuits differ in the exact kind of test they apply under either standard.[17]

Kingsley's argument from precedent allows but does not require an objective standard beyond the context of excessive force. *Kingsley* used broad language to discuss precedent, but at its heart the opinion simply noted that a prior case allowed a Fourteenth Amendment claim based on objective evidence.[18] Therefore, the Court reasoned, Fourteenth Amendment claims by pretrial detainees do not always require subjective proof of intent to punish, [19] paving the way for their objective test for excessive force claims. However, the fact that claims under the Fourteenth Amendment have been established without a subjective showing does not necessarily lead to the conclusion that such a showing is *never* required, only that it is not required in all cases. Thus, the Tenth circuit was right when it noted that the reasoning of *Kingsley* could be extended to deliberate indifference claims,[20] but such an extension of the subjective standard was not necessitated by *Kingsley*.

Other factors discussed in *Kingsley* do not speak to deliberate indifference claims either. *Kingsley* does include other factors supporting its holding, such as the workability of an objective standard and the existence of other means to protect officers acting in good faith from undue liability under an objective standard.[21] However, the Court's reasoning uses language much more specific to the excessive force context than in the section of their opinion concerning precedent.

The court speaks specifically to "split-second judgments" and "officer training,"[22] considerations that are largely inapplicable to the provision of care by jail medical staff. While a subjective standard in deliberate indifference cases might find support in these considerations generally, it would be a stretch to say that *Kingsley* spoke to the issue specifically.

Thus, though *Kingsley* spoke in broad language in discussion of precedent, it did not clearly speak to the standard for deliberate indifference. In fact, the term does not appear in the Court's opinion.[23] Furthermore, *Farmer* itself clearly distinguished excessive force from deliberate indifference claims.[24] Though other courts have seen fit to reevaluate their own holdings in light of *Kingsley*, the language of *Kingsley* was not definitive as to the test for all deliberate indifference claims. Thus, the Tenth Circuit was necessarily constrained by its own precedent into applying a subjective standard because it could not overrule itself without en banc consideration.[25]

B. *The court incorrectly reasoned that the standard for deliberate indifference should remain subjective based on factors other than stare decisis.*

The court was correct to bind itself to precedent, however the court deployed poor reasoning in its own analysis of the proper test for deliberate indifference.

Though *Farmer* is foundational in defining the test for deliberate indifference, the court should have been more skeptical of reliance on Eighth Amendment precedent. For one, the court distinguishes *Kingsley* because it did not involve medical staff but fails to note that *Farmer* similarly did not involve medical staff. [26] Consistent reasoning would require the court to provide some reason that the distinction between medical staff and detention officers should be instructive in its analysis of *Kingsley* but not *Farmer*.

Further, *Kingsley* casts doubt on the assumption that Eighth and Fourteenth Amendment rights are so closely related. *Kingsley* distinguished Eighth Amendment from Fourteenth Amendment cases because the amendments themselves differed, as did the nature of the claims.[27] *Kingsley* noted that while Eighth Amendment claims were based on what constituted cruel and unusual punishment, "pretrial detainees (unlike convicted prisoners) cannot be punished at all."[28] *Kingsley* therefore took pains to make clear that its ruling did not address the standard for an excessive force claim under the Eighth Amendment.[29] Reliance on Eighth Amendment cases in the Fourteenth Amendment context is thus seriously undercut by *Kingsley*.

The court's analysis of the term "deliberate" was condemned by *Farmer*, a case the court later relies on. The Tenth Circuit analyzed a dictionary definition of "deliberate," concluding that "a deliberate indifference claim presupposes a subjective component."[30] But *Farmer* explicitly rejected the "parsing of the term deliberate indifference" and instead reasoned that "'deliberate,' for example, arguably requires nothing more than an act (or omission) of indifference to a serious risk that is voluntary, not accidental," though ultimately rejecting such an interpretation.[31] The Tenth Circuit's textual analysis of the term deliberate is therefore seriously undercut by *Farmer*'s characterization of the term as a "judicial gloss."[32]

The court's final line of reasoning fails to interpret precedent in context. The court argues that *Farmer* distinguished excessive force claims from deliberate indifference claims because *Farmer* did not "require that an official subjectively intended for force to be excessive."[33] Thus, the court concluded, there is an intent requirement inherent in deliberate indifference claims that is not necessary for excessive force cases like *Kingsley*.[34]

This analysis of *Farmer* gets the point backwards. *Farmer* specifically noted that the test for excessive force claims under the Eighth Amendment required a showing *above and beyond*

deliberate indifference.[35] Thus, *Farmer* positioned the standard for excessive force as stricter than that for deliberate indifference, the inverse of the position the Tenth Circuit takes. Therefore, the court's argument distinguishing the intent requirement between excessive force and deliberate indifference claims finds no support in *Farmer*.

In sum, The court's arguments concerning the relevance of *Farmer* to this question, their textual analysis, and their analysis of *Farmer*'s holding all fail to support their conclusion that the standard for a deliberate indifference claim must be subjective.

C. *In light of Kingsley, the court should take the chance to seriously reevaluate their decision to require a subjective showing in deliberate indifference claims.*

The court should have determined that *Kingsley* and its reasoning permitted an objective standard in Fourteenth Amendment cases. This was the determination made by the Ninth Circuit, who reasoned that *Kingsley*'s language distinguishing Eighth and Fourteenth Amendment claims permitted the application of different standards under each.[36] Thus, thew court could have concluded that only Tenth Circuit precedent, but not *Farmer*, controlled.

Given this, there are good reasons why the Tenth Circuit should take the chance to sit en banc and reevaluate their previous decision to apply a subjective standard. It is important to remember that deliberate indifference is a standard above negligence, providing significant protection to officials.[37] *Kingsley* speaks further about other jurisprudential considerations that protect officers acting in good faith, such as courts' "deference to policies and practices needed to maintain order," and the doctrine of qualified immunity.[38]

Deference towards officials is prevalent throughout cases involving detention. For example, in *Miranda v County of Lake* reasonable reliance on medical personnel ensured that officials were not held liable for the actions of those personnel.[39] Further, when evaluating a

hunger strike policy, the *Miranda* court took notice of the fact that the inmate went longer without food and water than anyone in the jail's history.[40]

Kingsley also notes that an objective standard is easier to administer. In *Caldwell v. Warden FCI Taladega,* the Eleventh Circuit applied a subjective standard to the deliberate indifference claim of a prisoner who, despite telling officers he feared for his life, was put back with a cellmate known to be unstable and violent, who had started a fire in the cell, and who ended up stabbing the prisoner.[41] The court, unable to simply evaluate officers' behavior based on what they had been told, devoted significant analysis to whether a jury could reasonably find that the officers had what amounted to constructive notice, ultimately reversing the lower court.[42] Not only would the case have been simpler from an objective standpoint, it would ultimately have turned on many of the same considerations. Moreover, the fact that this represents an edge case requiring elevation to and reversal by an appeals court does not reflect well on the behavior that judges have *allowed* under the subjective standard.

There are additional reasons for applying a subjective standard to Fourteenth Amendment claims, such as the lack of any state of mind requirement in the underlying right of action,[43] and the fairness of allowing pre-trial detainees to pursue claims under a less strict standard.[44]

III. Conclusion

In *Strain*, the Tenth Circuit correctly ascertained that *Kingsley* did not control the standard for a deliberate indifference claim under the Fourteenth Amendment and ruled in accordance with precedent. However, the court incorrectly determined that under *Farmer* the standard for a deliberate indifference claim should still be objective, while in fact *Farmer* should not be seen to directly control Fourteenth Amendment deliberate indifference claims. Thus, the Tenth Circuit should give serious consideration to overruling its precedent on this issue.

[1] *See* Farmer v. Brennan, 511 U.S. 825, 828 (1994).

[2] *Id.* at 847.

[3] *See e.g.,* Whiting v. Marathon Cnty. Sheriffs Dept., 382 F.3d 700, 703 (2004) ("[T]he legal standard for a § 1983 claim is the same under either the Cruel and Unusual Punishment Clause of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment."); Castro v. Cnty. of L.A., 833 F.3d 1060, 1067 ("[T]he Court had consistently held . . . that the due process rights of a pretrial detainee are "at least as great as the Eighth Amendment protections available to a convicted prisoner.").

[4] 576 U.S. 389 (2015).

[5] Strain v. Regalado, 977 F.3d 984, 987 (10th Cir. 2020).

[6] *See id.* at 989.

[7] *Id.*

[8] *Id.* at 987.

[9] *Id.* at 987–988.

[10] *Id.* at 988.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Compare Castro*, 833 F.3d at 1070 (applying an objective standard to failure-to-protect claims based on *Kingsley*), *and* Darnell v. Pineiro, 849 F.3d 17, 35 (2nd Cir. 2017) (concluding that after *Kingsley*, deliberate indifference claims no longer required a subjective showing), *with* Dang *ex rel.* Dang v. Sheriff, Seminole Cnty. 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (declining to apply *Kingsley* to a claim of inadequate medical treatment), *and* Whitney v. City of St. Louis 887 F.3d 857, 860 n.4 (8th Cir. 2018) (distinguishing *Kingsley* as an excessive force case). *See generally Strain*, 977 F.3d at 990 n.4.

[17] *Compare Castro*, 833 F.3d at 1071 (applying a four-element objective test for deliberate indifference), *with Darnell*, 849 F.3d at 29, 35 (applying a disjunctive 2-element test allowing objective showings of deliberate indifference). *Compare Dang*, 871 F.3d at 1280 (applying a 3 element subjective test for deliberate indifference), *with Whitney*, 887 F.3d at 860 (applying a 2element subjective test for deliberate indifference).

[18] *See* Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015).

[19] *See id.*

[20] *See Strain,* 977 F.3d at 991 ("[T]he Court did not foreclose the possibility of extending the purely objective standard to new contexts.").

[21] *See Kingsley,* 576 U.S. at 399–400.

[22] *Id.* at 399.

[23] *See id.*

[24] *See* Farmer v. Brennan, 511 U.S. 825, 835 (1994).

[25] *See Strain*, 977 F.3d. at 993 (citing United States v. White, 782 F.3d 1118, 1126–27 (10th Cir. 2015)).

[26] *See id.*, 977 F.3d at 992 n.5.

[27] *See Kingsley*, 576 U.S. at 400.

[28] *Id.*

[29] *Id.* at 402.

[30] *Strain*, 977 F.3d at 992.

[31] Farmer v. Brennan, 511 U.S. 825, 840 (1994).

[32] *Id.* at 840.

[33] *Strain*, 997 F.3d at 992.

[34] *See id.*

[35] *See Farmer*, 511 U.S. at 835 ("The claimant must show that officials applied force "maliciously and sadistically for the very purpose of causing harm.'" (quoting Hudson v. McMillian, 503 U.S. 1, 6 (1992))).

[36] *See* Castro v. Cnty. of L.A., 833 F.3d 1060, 1069 (2017).

[37] *See, e.g.,* Kingsley v. Hendrickson, 576 U.S. 389, 396 (2015).

[38] *Id.* at 399–400.

[39] *See* 900 F.3d 335, 343 (2018).

[40] *See id.* at 344.

[41] 748 F.3d 1090, 1093–1096, 1099 (2014).

[42] *See id.* at 1102.

[43] *See* Castro v. Cnty. of L.A., 833 F.3d 1060, 1069 (2017). (citing Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 405 (1997)). *See generally* 42 U.S.C. § 1983 (Westlaw through Pub. L. No. 117-102).

[44] *See generally*, Recent Case, Swain v. Junior*, 961 F.3d 1276 (11th Cir. 2020)*, 134 HARV. L. REV. 2622 (2021).

Applicant Details

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Applicant Education

BA/BS From	**University of Pennsylvania**
Date of BA/BS	**December 2018**
JD/LLB From	**Howard University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50906&yr=2011**
Date of JD/LLB	**May 11, 2024**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Howard Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Appellate**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 8, 2023

The Honorable Jamar Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year law student at Howard University School of Law, and I am applying for a clerkship position in your chambers for the 2024 term. I am eager for the opportunity to strengthen my analytical and writing skills while gaining exposure to the wide variety of legal issues before the U.S. District Court for the Eastern District of Virginia. I have a demonstrated interest in a career as a litigator, and my experiences to date have prepared me to undertake the responsibilities of a clerkship in your chambers.

I have developed strong analytical, research, and writing skills through my academic and professional experiences. In my current 2L summer, I am working with trial and appellate partners at Paul, Weiss, Wharton, Rifkind & Garrison's Washington D.C. office, where I have been staffed on matters ranging between securities, antitrust, and immigration. I have also committed to an externship at the U.S. Department of Justice Civil Division's Appellate Staff for fall of 2023. My motivation to pursue these opportunities arose from prior legal experience that reinforced my interest in a litigation career. For instance, during my first law school summer at Selendy Gay Elsberg in New York, I received excellent feedback on appellate briefs and research assignments on trial and pre-trial issues I drafted. Additionally, as a student-attorney in Howard Law's Civil Rights Appellate Clinic, I wrote an appellate brief that I argued in moot court and co-drafted a petition for certiorari filed at the U.S. Supreme Court. All these experiences and more will have fine-tuned my research and writing skills before working in your chambers.

I believe other aspects of my background will likewise serve me well as a law clerk working on complex issues of federal and state law. Before law school, I gained significant experience working with securities, banking, and federal administrative agencies, including the U.S. Department of the Treasury, while working at Goldman Sachs, Bank of America Private Bank, and Accenture Consulting. These roles exposed me to varying application of federal law while developing my attention to detail and an ability to work in fast-paced, demanding environments. Additionally, as a teaching assistant for Legislation & Regulation, I practiced distilling complex information to assist first-year law students in learning topics in statutory interpretation and administrative law.

In sum, clerking in your chambers would be a great opportunity, and I am confident I will make valuable contributions to your work. Enclosed are my resumé, transcript, and writing sample. Letters of recommendation from Maria Ginsburg, a partner at Selendy Gay Elsberg, and Howard Law Professors Andrew Gavil and Valerie Schneider will arrive under separate cover. If you would like to speak to Kannon Shanmugam or Raymond Tolentino, they welcome your call (contact information below). Should you require additional information, please do not hesitate to let me know. Thank you for your consideration.

Warmly,

Ebe Inegbenebor
Enclosures

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EDUCATION

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GPA: 89.49/100 (top 10%)
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Note (working product): *Power at What Cost: A Discussion of* Moore v. Harper *as an Example of the Supreme Court's Continued Trend Towards Immense Power*

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B.A. in Political Economics, Minors in Development and Africana Studies

Honors: 2017–2018 Dean's List (3.7+ GPA), Onyx Senior Honor Society Founder's Award, Ron Brown CAPtain Scholar
Activities: Penn Undergraduate Urban Research Colloquium, Lauder Institute's Think Tanks and Civil Societies Program, Wharton African Business Forum, Founder of West African Vibe Dance Group

University of Pennsylvania Carey Law School's Global Institute for Human Rights May 2018
Certificate in Global Human Rights Law, Concentrations in Business & Human Rights and Gender & Human Rights

EXPERIENCE

U.S. Department of Justice, Civil Division, Appellate Section, Washington, D.C.
Incoming Fall Extern August 2023 – December 2023

Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, D.C.
Summer Litigation Associate and Pauli Murray Fellow May 2023 – July 2023

Howard University School of Law Civil Rights Appellate Clinic, Washington, D.C.
Student Attorney August 2022 – December 2022

- Co-wrote a petition for certiorari with two other student-attorneys filed at the U.S. Supreme Court for *N.S. v. Kansas City Board of Police Commissioners*, No. 22-556, challenging the qualified immunity doctrine
- Drafted mock appellate briefs and participated in a mock oral argument on a *Batson* challenge issue

Selendy Gay Elsberg, PLLC, New York, N.Y.
Summer Litigation Associate May 2022 – July 2022

- Co-drafted two amicus briefs filed at the N.Y. Court of Appeals and the U.S. Court of Appeals for the Second Circuit
- Drafted extensive legal memoranda for employment discrimination claims and a FINRA securities arbitration
- Attended federal trial court hearings and oral arguments on appeal; participated in a mock trial training

Accenture Federal Services, Washington, D.C.
Management Consulting Senior Analyst June 2020 – August 2021

- Collaborated with leadership at the U.S. Department of Treasury to develop a long-term strategy for overhauling the IRS's organizational structure and IT architecture to align with the 2019 Taxpayer First Act

Bank of America Private Bank, Washington, D.C.
Investment Management & Wealth Development Analyst (management pipeline program) February 2019 – May 2020

- Proposed strategic plans to bring in new business, track incoming revenue, and coordinate prospecting event planning
- Produced a program that analyzed market returns for a large client's portfolio, which helped raise $3.5M for the Bank

Goldman Sachs, New York, N.Y.
Summer Analyst, Regulatory Monitoring & Operations June 2017 – August 2017

- Coded semi-automatic FINRA reporting procedures that improved the organization's reporting timeliness

PUBLICATION

- James G. McGann, et al., *Fit for the Future: Enhancing the Capacity, Quality, and Sustainability of Africa's Think Tanks*, TTCSP GLOB. & REG'L THINK TANK SUMMIT REPS (2017).

INTERESTS

Civil rights, Chimamanda Adichie's novels, Afrobeat dance and music, Bikram yoga

HOWARD UNIVERSITY School of Law

GRADING POLICY/GRADE CUT-OFFS

THE CURRENT GRADING POLICY AND GRADE CUT-OFFS FOR THE CLASSES OF 2022 AND 2023 ARE AS FOLLOWS:

OUT OF A SCALE OF 100

CLASS OF 2023

Class Rank	Cum GPA
Top 10%	89.97-above
Top 15%	88.77-above
Top 25%	86.90-above
Top 33%	85.13-above

CLASS OF 2024

Class Rank	Cum GPA
Top 10%	88.7-above
Top 15%	87.6-above
Top 25%	86.17-above
Top 33%	84.67-above

FINAL GRADES SYSTEM

A	90-100
B	80-89
C	70-79
D	60-69
F	50-59

4-POINT SCALE CONVERSION

Cum GPA	Standard GPA
90-100	4.0
89-85	3.99 - 3.50
84-80	3.40 - 3.00
79-75	2.99 - 2.50
74-70	2.49 - 2.00
69-65	1.99 - 1.50
64-60	1.49 - 1.00
59-less	.99 - less

A J.D. student will be placed on academic probation if the student has a cumulative weighted grade point average between 72.00 and 74.99 after the end of the first year. A student who is on academic probation after the end of the first year must also participate in the upper-class Academic Support Program. Failure to participate in the Academic Support Program is grounds for dismissal. With the exception of the summer semester, probation shall terminate during the semester in which the student obtains a cumulative GPA of 75.

Display Transcript

@02748566 Ebehireme E. Inegbenebor
May 15, 2023 12:56 am

This is NOT an official transcript. Courses which are in progress may also be included on this transcript.

Institution Credit Transcript Totals Courses in Progress

Transcript Data

STUDENT INFORMATION

Curriculum Information

Current Program

Juris Doctor

Program: Juris Doctor

College: School of Law

Major and Department: Law, Law

***Transcript type:WEB is NOT Official ***

INSTITUTION CREDIT -Top-

Term: Fall 2021

College: School of Law

Major: Law

Student Type: First-Time Professional

Academic Standing:

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R	CEU Contact Hours
LAW	507	Main	LW	Leg. Reg.	97	3.000	291.00			
LAW	617	Main	LW	Torts	85	4.000	340.00			
LAW	619	Main	LW	Civil Procedure I	85	4.000	340.00			

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	11.000	11.000	11.000	11.000	971.00	88.27
Cumulative:	11.000	11.000	11.000	11.000	971.00	88.27

Unofficial Transcript

Term: Spring 2022

College: School of Law

Major: Law

Student Type: Continuing

Academic Standing: Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and	R	CEU Contact Hours

								End Dates
LAW	612	West/Law	LW	Constitutional Law I	88	3.000	264.00	
LAW	613	West/Law	LW	Legal Reasoning Research Writ	88	4.000	352.00	
LAW	614	West/Law	LW	Property	96	4.000	384.00	
LAW	615	Main	LW	Contracts	84	5.000	420.00	
LAW	616	West/Law	LW	Criminal Law	80	3.000	240.00	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	19.000	19.000	19.000	19.000	1660.00	87.37
Cumulative:	30.000	30.000	30.000	30.000	2631.00	87.70

Unofficial Transcript

Term: Fall 2022

College: School of Law

Major: Law

Student Type: Continuing

Academic Standing:

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R	CEU Contact Hours
LAW	621	Main	LW	Constitutional Law II	86	3.000	258.00			
LAW	654	Main	LW	Legal Writing II	90	2.000	180.00			
LAW	680	Main	LW	Federal Courts	92	3.000	276.00			
LAW	721	Main	LW	Civil Rights Clinic I	92	6.000	552.00			

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	14.000	14.000	14.000	14.000	1266.00	90.43
Cumulative:	44.000	44.000	44.000	44.000	3897.00	88.57

Unofficial Transcript

Term: Spring 2023

College: School of Law

Major: Law

Student Type: Continuing

Academic Standing:

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R	CEU Contact Hours
LAW	414	Main	LW	Envir. & Energy Adm. & Reg Law	90	2.000	180.00			
LAW	629	West/Law	LW	Evidence	96	4.000	384.00			
LAW	698	West/Law	LW	CD: Supreme Ct Jurisprudence	94	3.000	282.00			
LAW	760	West/Law	LW	Trial Advocacy/Civil Exp	P	2.000	0.00			

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	11.000	11.000	11.000	9.000	846.00	94.00
Cumulative:	55.000	55.000	55.000	53.000	4743.00	89.49

Unofficial Transcript

TRANSCRIPT TOTALS (LAW) -Top-

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	55.000	55.000	55.000	53.000	4743.00	89.49
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	55.000	55.000	55.000	53.000	4743.00	89.49

Unofficial Transcript

COURSES IN PROGRESS -Top-

Term: Fall 2021

College: School of Law

Major: Law

Student Type: First-Time Professional

Subject	Course	Campus	Level	Title	Credit Hours	Start and End Dates
LAW	613	Main	LW	Legal Reasoning Research Writ	0.000	
LAW	615	Main	LW	Contracts	0.000	

Unofficial Transcript

Term: Fall 2022

College: School of Law

Major: Law

Student Type: Continuing

Subject	Course	Campus	Level	Title	Credit Hours	Start and End Dates
LAW	805	Main	LW	Law Journal-2L	1.000	

Unofficial Transcript

Term: Spring 2023

College: School of Law

Major: Law

Student Type: Continuing

Subject	Course	Campus	Level	Title	Credit Hours	Start and End Dates
LAW	687	West/Law	LW	Professional Responsibility	3.000	
LAW	805	West/Law	LW	Law Journal-2L	0.000	

Unofficial Transcript

Term: Fall 2023

College: School of Law

Major: Law

Student Type: Continuing

Subject	Course	Campus	Level	Title	Credit Hours	Start and End Dates
LAW	509	Main	LW	CD: Civil Lit. Practice	1.000	
LAW	525	Main	LW	Advanced Civil Procedure	3.000	
LAW	642	Main	LW	Criminal Procedure I	3.000	
LAW	647	Main	LW	Family Law	3.000	
LAW	769	Main	LW	CD: Business Organizations	3.000	
LAW	805	Main	LW	Law Journal-3L	1.000	

Unofficial Transcript

Overall Financial Aid Status Financial Aid Eligibility Menu View Status of Transcript Requests

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HOWARD UNIVERSITY

Excellence in Truth and Service

School of Law
Clinical Law Center

May 9, 2023

To Whom It May Concern:

I write in support of Ebehireme "Ebe" Inegbenebor who has applied for a clerkship in your chambers.

Ms. Inegbenebor was an excellent student in my property class, earning one of the highest grades in the course. Her response to the complicated essay question on her final exam was concise, logical and well-written; it was the exact type of analysis a professor hopes to receive at the end of the semester. In addition to performing well under pressure in a timed exam, Ms. Inegbenebor was consistently prepared for class and her contributions were thoughtful and well-reasoned. I was not surprised that Ms. Inegbenebor earned an 'A' in my course and that she also excelled in legal writing and her clinical experience.

Because of her excellent performance in my course, Ms. Inegbenebor will serve as my teaching assistant in the spring of 2024. In this role, she will be responsible for running weekly office hours with first year law students and providing feedback on their written work. I can tell from her presentation and writing style that she is an organized thinker who will provide invaluable insight to first year law students.

While I did not have an opportunity to supervise Ms. Inegbenebor on lengthy written assignments, her performance in my property class demonstrates that she is a solid legal writer—she approaches legal issues with an effective mix of organization and creativity, and she is able to clearly articulate both solutions to legal problems and her reasoning. Just as importantly, Ms. Inegbenebor is a collegial and collaborative law student and it has been a pleasure to get to know her during her time at Howard. I recommend her without reservation.

Sincerely,

/Valerie Schneider/
Director, Clinical Law Center
Howard University School of Law
2900 Van Ness Street NW
Washington DC 20008
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vschneider@law.howard.ed

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212.390.9000

Maria Ginzburg
Managing Partner
212.390.9006
mginzburg@selendygay.com

June 2, 2023

Via E-mail

To Whom This May Concern:

I am delighted to write this letter to recommend Ebe Inegbenebor for a clerkship in your chambers. I supervised Ebe on client matters during her summer as a litigation associate at Selendy Gay Elsberg and mentored her throughout that summer. Ebe's writing skills received excellent reviews, and her legal research and creative analytical abilities made her a valuable member of case teams. In addition, Ebe is a wonderful person and the personal time I spent with her makes me confident that any team she joins, including yours, will welcome her.

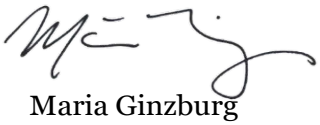
Ebe was staffed on two matters that I supervised. Senior associates who supervised these matters quickly trusted Ebe to write research emails and memoranda addressing complex issues regarding e-discovery and securities arbitration. Ebe also spent a considerable amount of time researching possible solutions to a remedies issue. Ebe's work was thorough and her discussions over the law provided clarity. She was reliable, inquisitive, and enthusiastic about her work. This made her a pleasure to work with.

Ebe also worked on two appellate matters under a former partner at our firm: one amicus brief to the U.S. Court of Appeals for the Second Circuit, and another amicus brief to the New York Court of Appeals. While I was not on that matter myself, I understand that the amicus brief to the New York Court of Appeals that our firm filed made a compelling argument that clarified opposing counsel's use of an integral case. It was Ebe who noticed the opportunity to clarify this incorrect use of the case law during her legal research and meticulous reading of the briefs.

During the summer at Selendy Gay Elsberg, the summer program leadership contracts professionals to train and develop summer associates, including a legal writing coach. After reviewing Ebe's legal memorandum about the case discussed above, the coach personally sent an email to the summer program leadership to note how impressive Ebe's writing was. She noted that it was some of the best she had ever seen from even a senior associate and was surprised to hear Ebe had only completed one year of law school.

I loved being Ebe's mentor because she is such a warm person full of integrity. She is also collaborative, enthusiastic, gentle, hard-working, and firm. We hope she returns to us and I know that she will leave a positive impact working for your chambers.

Sincerely,



Maria Ginzburg
Managing Partner

HOWARD
UNIVERSITY

SCHOOL OF LAW

June 1, 2023

Re: Letter of Recommendation for Ms. Ebehireme "Ebe" Inegbenebor

Dear Judge:

It is my great pleasure to introduce and commend to you my student, Ms. Ebehireme "Ebe" Inegbenebor, who is applying to your chambers for a clerkship. As you will quickly see from her application and hopefully a personal interview, Ms. Inegbenebor is an accomplished and mature candidate, who combines outstanding academic performance in law school with exceptional analytical and writing skills. She will also bring specific and valuable experience in brief-writing and judicial decision-making to the court, drawn from her coursework, including our Civil Rights Appellate Clinic, her summer work in the appellate practice group at Paul Weiss, and her planned externship this Fall at the Justice Department.

I am very well acquainted with Ms. Inegbenebor's academic and personal strengths, having taught her as a professor and supervised her work in my capacity as Faculty Advisor to the Howard Law Journal (HLJ), our flagship student publication. Especially relevant to her potential service as your clerk, she has outstanding analytical abilities and is an exceptional writer. She received among the highest grades awarded in both my Federal Courts course and Supreme Court Jurisprudence seminar. In the seminar, the students work collaboratively as a simulated "Supreme Court" to decide three cases pending during the current term. Each student then drafts an opinion resolving the issues in the case. Ms. Inegbenebor's three opinions were outstanding. She immersed herself in the legal issues and arguments of the parties and produced three exceptionally well-written, thoughtful, and sophisticated opinions. It is an easy prediction that she will enthusiastically and skillfully embrace the issues that confront the court.

Ms. Inegbenebor will be a committed and focused clerk, who will work well with others and continue to grow and excel as a professional. She will bring much to the court and take away much professionally if given the opportunity to serve as a clerk.

Please contact me at your convenience at either 202-806-8018 or agavil@law.howard.edu if I can be of any further assistance as you make your hiring decisions.

Sincerely,

Andrew I. Gavil
Professor of Law &
Faculty Advisor, Howard Law Journal

2900 Van Ness Street, NW
Washington, DC 20008

(202) 806-8000
Fax (202) 806-8428
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Ebehireme "Ebe" Inegbenebor Ebehireme.Inegbeneb@law.bison.howard.edu | (410) 241-5644
8250 Georgia Avenue, Apt. 1103, Silver Spring, MD 20910

WRITING SAMPLE

My writing sample is an assignment that I submitted as a student in the Supreme Court Jurisprudence seminar at Howard University School of Law. In this seminar, students were tasked with reading briefs and pertinent case law to decide three cases pending before the U.S. Supreme Court this past term chosen by our professors. While acting as "Supreme Court justices," we discussed the briefs and legal arguments before voting on the questions presented. We then individually wrote "Supreme Court opinions" based on our analysis and perspectives on the law.

This "opinion" is for *Jack Daniel's Properties, Inc. v. VIP Products LLC*, 598 U.S. ___ (2023) (No. 22–148), in which the Supreme Court will decide whether the First Amendment shields respondent VIP's humorous use of petitioner Jack Daniel's trade dress to make dog toys from trademark infringement liability under the Lanham Act.[1] The questions presented are:

1. Whether humorous use of another's trademark as one's own on a commercial product is subject to the Lanham Act's traditional likelihood-of-confusion analysis, or instead receives heightened First Amendment protection from trademark infringement claims; and
2. Whether humorous use of another's mark as one's own on a commercial product is "noncommercial" under 15 U.S.C. § 1125(c)(3)(C), thus barring as a matter of law a claim of dilution by tarnishment under the Trademark Dilution Revision Act.

On the first question, my opinion argues that VIP's humorous use of Jack Daniel's trade dress may fall outside the scope of First Amendment protection, and thus become subject to the Lanham Act, because VIP's use of the trademark could be considered deceptive or tarnishing to Jack Daniel's brand. On the second question, my opinion argues that because VIP sold the dog toys in commerce and the use of Jack Daniel's mark was VIP's selling point for the dog toys, this constituted commercial use. My opinion vacates the judgment below and remands the case to the district court for further inquiry into whether VIP's use of Jack Daniel's mark was deceptive or tarnishing.

Per the assignment's requirements, the background section is shorter than it would be in an actual Supreme Court opinion. Aside from my final grade on the assignment, this opinion is entirely my own work. I have not received any feedback, nor has it been edited by others.

[1] As of the date that this clerkship application is submitted, the Supreme Court has not yet decided the case.

SUPREME COURT OF THE UNITED STATES

No. 22–148

JACK DANIELS PROPERTIES, INC., PETITIONER
v.
VIP PRODUCTS LLC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 21, 2023]

JUSTICE INEGBENEBOR delivered the opinion of the Court.

The provisions of the Lanham Act allow a plaintiff to bring a cause of action for trademark dilution or infringement. 15 U.S.C. §§ 1114–18, 1125, 1127. The Trademark Dilution Revision Act of 2006, *id.* at § 1125(c)(3)(C), states that "any noncommercial use of a mark * * * shall not be actionable as * * * dilution by tarnishment * * * ."

The questions presented here are coupled. *First*, we discuss whether humorous use of another's trademark as one's own on a commercial product is subject to the Lanham Act's traditional likelihood-of-confusion analysis, or instead receives heightened First Amendment protection from trademark infringement liability. *Second*, we discuss whether humorous use of another's mark as one's own on a commercial product is "noncommercial" under 15 U.S.C. § 1125(c)(3)(C), thus barring as a matter of law a claim of dilution by tarnishment under the Trademark Dilution Revision Act. We hold that humorous use of another's mark falls

outside the scope of First Amendment protection, and thus becomes subject to the Lanham Act, when the use of the mark becomes deceptive or tarnishing to a brand. Accordingly, humorous use of another's mark to place a product in the stream of commerce is commercial by definition.

I

Jack Daniel's Properties, Inc. ("JDP") is a 148-year-old U.S.-based company known for its manufacturing and distillation of liquors, primarily whiskey products. Valued at $6.5 million, its large brand is well-known for its trade dress: a distinctive square prismatic bottle shape with "Jack Daniel's Tennessee WHISKEY, old No. 7" as an arched logo written in white Jasper font and twirling white lines against a black label. The brand has become an "icon" of sorts.[1] It has remained consistent for much of the company's existence and has a significant effect on JDP's profits.

VIP Products LLC ("VIP") is the United States' second largest manufacturer of dog toys and sells its products both domestically and internationally at pet suppliers and common retailers, such as Amazon, Inc. and Walmart, Inc. Its brand is rooted in parody—the company is known to create humorous near-replicas of iconic brands in the form of dog toys to sell to consumers without first obtaining licenses. One such product is its "Bad Spaniels" toy. Similar to the traditional Jack Daniel's trade dress, the Bad Spaniels toy mimics the square prismatic bottle shape of the Tennessee Whiskey bottle with writing in a similar font against the same black label and "Bad Spaniels" appearing in arched

[1] Br. for Resp't at 3.

form. The principal difference is that the writing's substance references canine feces and features an image of a Spaniel breed dog. The back of the product's hang tag states in small-scale script, "This product is not affiliated with Jack Daniel Distillery."[2]

JDP sought to enjoin VIP's sale of Bad Spaniels under the Lanham Act, claiming that the toy likely confused consumers and thus infringed on Jack Daniel's marks and trade dress, 15 U.S.C. §§ 1114(1), 1125(a), and diluted Jack Daniel's famous marks by tarnishment by associating them with canine feces and with products that appeal to children, *id.* at § 1125(c)(1). The District Court agreed. *VIP Prod., LLC v. Jack Daniel's Properties, Inc.*, No. CV–14–2057–PHX–SMM, 2016 WL 5408313 (D. Ariz. Sept. 27, 2016), *rev'd*, 953 F.3d 1170 (9th Cir. 2020).

The Court of Appeals reversed. *Id.* Despite agreeing that VIP's product was likely to confuse consumers, the Ninth Circuit relied on *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), to hold that VIP's "humorous" dog toy was an "expressive work" warranting heightened First Amendment protection from infringement liability.[3] The court further held that VIP's use of Jack Daniel's marks to sell its dog toy was "noncommercial" and thus immune from dilution liability because the toy was "humorous."

We granted JDP's petition for certiorari. JDP argues that the Court of Appeals' ruling erroneously abrogates trademark protections afforded by the Lanham Act by imposing heightened requirements on trademark owners to prove infringement in cases involving humor. JDP also argues that the meaning of "noncommercial use" as it is used in the Trademark Dilution

[2] Pet. App. 6a.
[3] Pet. App. 31a.

Revision Act should not include the use of a mark to sell a product. We agree with JDP in certain respects.

II

We disagree with the standard that the Court of Appeals applied in determining that VIP's product was not subject to Lanham Act infringement liability. Although parody warrants some First Amendment protection, this protection is limited when use of a mark becomes deceptive or tarnishing to a brand.

The Lanham Act prohibits the use of words or symbols likely to mislead consumers about a product's source. 15 U.S.C. §§ 1114(1)(a), 1125(a). The statute requires that the defendant's use be "likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1114(1)(a); *see also id.* at § 1125(a) ("likely to cause confusion, or to cause mistake, or to deceive * * * as to the origin, sponsorship, or approval"). This "likely to cause confusion * * * " element should not be restricted to a consumer's potential confusion between products on a store's shelf; consumers make mental associations with brands, and another product that is too similar to a trademark can alter those mental associations.

In 2006, Congress passed the Trademark Dilution Revision Act ("TDRA"), 15 U.S.C. § 1125(c), which amended the preceding Federal Trademark Dilution Act of 1995 ("FTDA") in several ways to agree with our decision in *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003).

The two statutes in tandem provide trademark owners with a cause of action for dilution. The TDRA made various revisions to the FTDA, four of which are relevant here. First, the TDRA extended the FTDA to trademark uses that are even "*likely* to

cause dilution." 15 U.S.C. § 1125(c)(1) (emphasis added). Second, the TDRA clarified that dilution encompasses both dilution by "blurring" and dilution by "tarnishment." *Id.* Dilution by blurring is any association that "impairs the distinctiveness of the famous mark," while dilution by tarnishment is any association "that harms the reputation of the famous mark." *Id.* at § 1125(c)(2)(B), (C); *see also Moseley*, 537 U.S. at 430, 432.

Third, Congress expanded the fair-use exclusion to cover other uses, like parody, as long as the defendant does not use the famous mark to designate the source of its own product. *Id.* at § 1125(c)(3)(A)(ii) (Fair use exclusion includes "use in connection with * * * identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner."). Fourth, Congress defined a "famous" mark as one "widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner," and instructed courts to consider "all relevant factors" in making that determination. *Id.* at § 1125(c)(2)(A).

This Court has not addressed issues like those presented in this case, so the Ninth Circuit relied on *Rogers v. Grimaldi*, a decision out of the Second Circuit, to hold that VIP's "humorous" dog toy was an "expressive work" warranting heightened First Amendment protection from infringement liability. 875 F.2d 994 (2d Cir. 1989).

In *Rogers*, musical star Ginger Rogers sued a movie producer over a film called "Ginger and Fred," claiming that the title misled consumers into thinking she endorsed the film. The Second Circuit rightly expressed concern that "overextension of Lanham Act restrictions in the area of titles might intrude on First

Amendment values." *Id.* at 998. Based on this concern, it held that the Lanham Act "should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression." *Id.* at 999. In the context of "allegedly misleading titles," the court held that the Act would not apply unless the title "ha[d] no artistic relevance to the underlying work whatsoever," or "explicitly misle[d] as to the source or the content of the work." *Id.*

The test arising from *Rogers* can be summarized as such: a challenged expression is protected from the Lanham Act under the First Amendment when a) the challenged expression has some artistic relevance to the underlying trademarked product and b) the challenged expression is not explicitly misleading as to the source of the content of the expression. The test attempts to strike a balance between protections we have constitutionalized under the First Amendment and the rights of business owners to own their product in a fair market. In practice, however, *Rogers* has overburdened the rights of business owners and overprotected the use of marks that constitute some sort of speech. The fact that nearly all uses of another's trademark is speech *per se* significantly skews the balance in favor of defendants in trademark infringement and dilution claims.

We have repeatedly said that "not all speech is of equal First Amendment importance." *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985)). The First Amendment protects speech that promotes our philosophical justifications for the dissemination of ideas, and speech that does not accomplish this goal requires further analysis to determine its First Amendment value. It is true that parody is generally protected

because of its contribution to the marketplace of ideas and its promotion of self-governance and self-fulfillment. *See Hustlers*, 485 U.S. at 57. However, intentionally misleading speech has never been protected. *Id.* at 53 ("It is the intent to cause injury that is the gravamen of the tort * * * "); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."). Because of this consideration, the Second Circuit has even retreated from its original Rogers analysis. *Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366, 1379 (2d Cir. 1993). In the context of commercial marketplaces, speech that crosses the line to become misleading to consumers is subject to narrowly tailored government restriction in order to promote fair market practices and encourage more knowledgeable consumers. The essence of a dilution claim is to preserve the value or "selling power" of famous marks, and this selling power also warrants protection. *See San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 541 (1987) ("The mere fact that [a defendant] claims an expressive, as opposed to a purely commercial, purpose does not give it a First Amendment right to appropriate to itself the harvest of those who have sown.").

Bearing this in mind, we are of the opinion that the test requires a larger burden shift to the defendant in a trademark dilution or infringement claim than already exists. As the Lanham Act currently requires, the party alleging dilution or infringement must prove actual dilution. Our precedent affirms this burden to establish a *prima facie* cause of action, and we maintain this precedent today. *Moseley*, 537 U.S. at 432–34.

However, a challenged expression that has some artistic relevance to an underlying trademarked product need only have a *sufficiently compelling* likelihood of confusion with the trademarked product to fall within the scope of the Lanham Act. We believe that this modified standard will rightly place more requirements on the defendant to disprove likelihood of confusion beyond a label on the back of a product with miniscule text or a hidden disclaimer in the credits of a film production. At the same time, the artistic, expressive, or humorous nature of a defendant's use of a trademark is relevant in an analysis. We believe the standard will also continue to protect a right to use *some* elements of a trademark for humorous purposes.

In the facts presented here, we do not believe VIP has met the burden of disproving a sufficiently compelling likelihood of confusion. VIP contends a difference between using parody to advertise a product and using parody to make a product. For the purposes of the arguments asserted, the Court sees no substantive difference between the two. Whether parody is used to advertise or create a product has no bearing on whether the parody takes from the intellectual property of another.

VIP also argues that because it has not used a trademark symbol, such as ® or ™, they have made no claim of a protectable trademark. This argument is essentially like that where a defendant attempts to disprove likelihood of confusion by a disclaimer, and we reject it. Affirming VIP's argument would make it far too easy to mimic a mark and plaster a disclaimer on the product to skirt around a possible trademark violation.

Finally, VIP argues that because JDP sells liquor and VIP sells pet products, the likelihood of confusion is too low to establish brand dilution. We disagree. JDP has a well-known

trademark, and VIP's Bad Spaniels toy shares such a strong similarity to JDP's trade dress—these elements should weigh heavily in a factor test. As mentioned above, much of a brand's strength is generated in the mental associations conducted by consumers. The products sold here have a significant tendency to create negative associations with JDP's brand, especially considering the fact that JDP manufactures and sells branded merchandise like apparel that increases the brand's visibility. At any point, JDP could rightly decide to make branded dog toys for the same brand visibility purpose, which would only strengthen the negative associations that VIP's product creates with their Bad Spaniels product.

Consequently, we disagree with the Court of Appeals' reasoning that VIP's product was insulated from infringement liability because of First Amendment protections, and we reverse the judgment of the Court of Appeals on this issue.

III

We also address whether use of another's mark as one's own on a commercial product is "noncommercial" under 15 U.S.C. § 1125(c)(3)(C). We hold that such use is not noncommercial.

The Trademark Dilution Revision Act ("TDRA"), 15 U.S.C. § 1125(c)(3), provides fair-use exceptions to a dilution cause of action challenging a defendant's use of another's mark. Under the statute, a party may bring a cause of action for dilution by blurring or dilution by tarnishment, except when there is, *inter alia*, "[a]ny noncommercial use of a mark." *Id.*

At dispute is whether VIP's use of JDP's mark is "noncommercial" in the context of the TDRA, § 1125(c)(3)(C). The

TDRA does not explicitly define "noncommercial use." However, a textual and contextual analysis of the statute would lead one to conclude that "noncommercial" as purported in the TDRA means any good or service sold in commerce. "Noncommercial" can be translated to "not commercial." *Webster's Third New International Dictionary of the English Language* 1536 (2002). Dictionaries define "commercial" as "concerned with or engaged in" "the activity of buying and selling," often in the context of "making or intending to make a profit," *The New Oxford American Dictionary* 341 (2d ed. 2005).

The TDRA defines "use in commerce" as use of a mark "in the ordinary course of trade," including when a mark is placed on goods "sold" or merely "transported in commerce." § 1127. Congress invoked its commerce clause authority when enacting the statute, so it is reasonable to conclude that it intended to exclude only use of a mark that is unrelated to the sale of goods or services because such regulation might expose the statute to constitutional challenges. And precedent affirms this interpretation of the meaning of "commercial." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (holding that use of parody when selling songs is commercial "since these activities are generally conducted for profit"). Thus, "noncommercial use" can be taken to mean any use of a mark that is not in the ordinary course of trade, i.e., when selling or transporting a good or service in commerce, regardless of whether the good or service is sold for a profit.

However, the Court of Appeals interpreted "noncommercial use" differently here. The court held that the noncommercial-use exception in the TDRA is any use of a mark involving humor or expression, which would include VIP's use of JDP's marks and

trade dress to sell the Bad Spaniels toy. Because this interpretation disagrees with judicial canons of interpretation, it was improper. As discussed above, the plain and statutory meanings of the term "commercial" are very clear and consistent. And *expressio unius est exclusio alterius* suggests that when a statute includes a list of specific items, that list is presumed to be exclusive; the statute applies only to the listed items and not to others, unless otherwise stated. The TDRA lists two other exclusions without any suggestion that the list is non-exhaustive. As a matter of constitutional avoidance, we presume that Congress considered speech protections when drafting the TDRA, and § 1125(c)(3) is evidence of this. Thus, any imposition of another exclusion by the Court of Appeals was improper.

Applying our rules, VIP's Bad Spaniels toy falls within the purview of the Lanham Act and is subject to infringement and dilution liability.

* * *

Because the facts here are subject to the Lanham Act and VIP has failed to proffer sufficient facts to counter a substantially compelling likelihood of confusion between its toy product and JDP's trade dress, the judgment of the Court of Appeals was improper. We reverse that judgment and remand the case to the District Court for further proceedings in accordance with this opinion.

It is so ordered.

Applicant Details

First Name	**Devin**
Middle Initial	**P**
Last Name	**Iorio**
Citizenship Status	**U. S. Citizen**
Email Address	**di4850a@american.edu**
Address	**Address** Street **4545 Connecticut Ave NW Apt 406** City **Washington DC** State/Territory **District of Columbia** Zip **20008** Country **United States**
Contact Phone Number	**6314873696**

Applicant Education

BA/BS From	**Trinity College**
Date of BA/BS	**May 2021**
JD/LLB From	**American University, Washington College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50901&yr=2010**
Date of JD/LLB	**May 19, 2024**
Class Rank	**25%**
Law Review/ Journal	**Yes**
Journal(s)	**Administrative Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Alvina Reckman-Myers First Year Moot Court Competition** **WCL Moot Court Honor Society Spring Qualifying Tournament**

Evan A. Evans Constitutional Law Moot Court Competition

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Ginsburg, Jessica
sardburg@aol.com
703-927-8270

Allen, Emily
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(907) 271-4724

Hildum, Robert
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202-442-9094

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Devin Iorio

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June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
600 Granby St
Norfolk, VA 23510

Dear Judge Walker,

I am a rising third-year student at American University's Washington College of Law and am writing to apply for a 2024-2025 Term Law Clerk position with your chambers. As an aspiring criminal attorney with hopes of practicing in Virginia, as well as strong passions for litigation and public service, I believe that a clerkship with your chambers is the ideal way to begin my legal career.

Through my professional and academic experiences, I have developed strong research and writing skills as well as a vigorous sense of initiative and work ethic. Last summer, I had the opportunity to intern with the U.S. Office of Special Counsel Disclosure Unit where I worked closely with attorneys to interview, research, and evaluate the claims of federal whistleblowers. As a Summer Law Clerk, my legal writing abilities were sharpened by drafting letters to federal agencies, congressional committee chairs, and the President. Additionally, I have continued to enhance my legal abilities through subsequent internships in Judge Beryl A. Howell's chambers in the U.S. District Court for the District of Columbia and the D.C. U.S. Attorney's Office. In these roles, I acquired practical firsthand experience by observing federal and local hearings, drafting legal memoranda, and assisting attorneys with case preparation.

I will continue to hone my legal skills through my ongoing participation as a member of the American University Criminal Law Practitioner, Moot Court Honor Society, and Administrative Law Review. I will also be able to further familiarize myself with criminal law next spring while working on cases referred from the Montgomery County Public Defender's Office as part of WCL's Criminal Justice Clinic.

I believe the knowledge and perspectives I have obtained from these experiences are readily applicable to a judicial clerkship and make me a strong candidate for a position with your chambers.

Please find attached my resume, writing sample, transcript, and letters of recommendation for your review. I would be happy to provide any further information you may require. Thank you for your time and consideration.

Sincerely,

Devin Iorio

Devin Iorio

4545 Connecticut Ave NW, Washington, D.C. | (631) 487-3696 | di4850a@american.edu

EDUCATION

American University Washington College of Law, Washington, D.C.
Juris Doctor Candidate | Top 25% May 2024
Honors: Admin. L. Rev. Volume 75.1 Notice of Superior Work | International Law Highest Grade Designation | Kenneth & Patricia Auberger Endowed Scholarship
Activities: Administrative Law Review, *Articles Editor* | Moot Court Honor Society, *Communications Committee* | Criminal Law Practitioner, *Articles Editor*

Trinity College, Hartford, CT
Bachelor of Arts in American Studies and Public Policy and Law, *cum laude* May 2021
Honors: Faculty Honors (2018-2020) | First-Year Papers Award (2018) | Catalyst Leadership Corps Scholar (2019) | Judy Dworin Award (2021)
Activities: Mock Trial Team, *Executive Board* | Pi Kappa Alpha Fraternity
Publication: Iorio, Devin, *An Analysis of Racialized Housing Segregation in America*, The Trinity Papers (June 14, 2021) https://digitalrepository.trincoll.edu/trinitypapers/97/.

EXPERIENCE

WCL Criminal Justice Clinic Defense Section, Washington, D.C.
Student Attorney Jan. 2024 – May 2024
- Will represent adults facing misdemeanor charges, juveniles, and individuals serving life sentences without parole for offenses committed as juveniles in cases referred from the Montgomery County Public Defender's Office.

U.S. Securities and Exchange Commission Office of the General Counsel, Washington, D.C.
Scholars Program Intern June 2023 – Aug. 2023
- Assist Adjudication Division attorneys in suspension, revocation, and follow-on administrative proceedings.
- Draft recommended agency orders and conduct research regarding Commission precedent and relevant statutes.

United States Attorney's Office for the District of Columbia, Washington, D.C.
Intern Jan. 2023 - April 2023
- Assisted attorneys in the Capitol Siege Section of the Criminal Division with exhibit preparation and motion drafting.
- Performed relevant research, drafted legal memoranda, and observed ongoing proceedings.

U.S. District Court for the District of Columbia, Washington, D.C.
Judicial Intern to Judge Beryl A. Howell Aug. 2022 – Dec. 2022
- Conducted legal research and drafted legal analytical memoranda concerning a range of pending civil and criminal matters including discrimination claims, sentencing disputes, executive agency actions, and education law issues.
- Attended and observed proceedings in civil and criminal matters, including trials and sentencing and motion hearings.

Office of Special Counsel Disclosure Unit, Washington, D.C.
Summer Law Clerk May 2022 – Aug. 2022
- Interviewed federal whistleblowers, evaluated disclosures, researched pertinent laws and regulations, and drafted internal memoranda and correspondence assessing whether disclosures supported a likelihood of wrongdoing determination.
- Drafted letters conveying determinations to federal agencies, congressional committee chairs, and the President.

Primus Project, Hartford, CT
Archival Research Associate May 2021 – Aug. 2021
- Researched, collected, organized and summarized Trinity College's historic relationship to slavery and slave culture.

Trinity College, Hartford, CT
Teaching Assistant Aug. 2019 – Dec. 2019
- Led study and peer review sessions in American Legal History to aid student brief writing and public speaking skills.

Suffolk County Legal Aid Society, Riverhead, NY
Intern May 2019 – Aug. 2019
- Shadowed attorneys in courtroom, jail, and judicial chambers and assisted in client intake and case preparation.

INTERESTS

Hiking | Mountain Biking | Cooking

LAST	FIRST	M	AU ID	BIRTH	SEX
IORIO	DEVIN	P	4424850	03/20	M

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Washington College of Law
ACADEMIC RECORD

AMERICAN UNIVERSITY
WASHINGTON, DC

Course Number	Course Title	Hnr	Crs Val	Grd	Quality Points
FALL 2021					
	DEGREE OBJECTIVE: JURIS DOCTOR				
LAW-501-002	CIVIL PROCEDURE		04.00	A-	14.80
LAW-504-002	CONTRACTS		04.00	B+	13.20
LAW-516-009	LEGAL RESEARCH & WRITING I		02.00	B	06.00
LAW-522-002	TORTS		04.00	B+	13.20
	LAW SEM SUM: 14.00HRS ATT 14.00HRS ERND 47.20QP 3.37GPA				
SPRING 2022					
LAW-503-002	CONSTITUTIONAL LAW		04.00	A	16.00
LAW-507-002	CRIMINAL LAW		03.00	A	12.00
LAW-517-009	LEGAL RESEARCH & WRITING II		02.00	B+	06.60
LAW-518-002	PROPERTY		04.00	B+	13.20
LAW-660-002	INTERNATIONAL LAW		03.00	A	12.00
	LAW SEM SUM: 16.00HRS ATT 16.00HRS ERND 59.80QP 3.73GPA				
FALL 2022					
LAW-508-003	CRIMINAL PROCEDURE I		03.00	B	09.00
LAW-601-002	ADMINISTRATIVE LAW		03.00	A	12.00
LAW-769-001	SUPERVISED EXTERNSHIP SEMINAR EXTERNSHIP SEMINAR		02.00	A-	07.40
LAW-770F-001	ADMINISTRATIVE LAW REVIEW I		01.00	--	--.--
LAW-847-003	APPELLATE ADVOCACY		03.00	A	12.00
LAW-899-001	EXTERNSHIP FIELDWORK		03.00	P	00.00
	LAW SEM SUM: 15.00HRS ATT 14.00HRS ERND 40.40QP 3.67GPA				
SPRING 2023					
LAW-550-004	LEGAL ETHICS		02.00	A-	07.40
LAW-611-001	BUSINESS ASSOCIATIONS		04.00	B	12.00
LAW-633-002	EVIDENCE		04.00	A	16.00
LAW-770S-001	ADMINISTRATIVE LAW REVIEW I		01.00	--	--.--
LAW-795PY-001	CONST POWERS OF THE PRESIDENCY		03.00	A	12.00
LAW-871SC-002	MOOT COURT COMPETITION		02.00	P	00.00
	LAW SEM SUM: 16.00HRS ATT 15.00HRS ERND 47.40QP 3.64GPA				

LAW CUM SUM: 61.00HRS ATT 59.00HRS ERND 194.80QP 3.60GPA
END OF TRANSCRIPT

Hilary T. Lappin
Registrar

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

Office of the Law School Registrar
4300 Nebraska Ave., NW, Suite C107
Washington, DC 20016-2132

BACHELOR OF LAWS/JURIS DOCTOR

The Degree of Bachelor of Laws was re-designated the Juris Doctor degree by the Board of Trustees of The American University on October 15, 1968. The J.D. degree is conferred nunc pro tunc as of the date of the student's actual graduation from the Washington College of Law.

GRADES (Calculated in grade point average)

Effective Fall 1968 through Summer Session 1975 the Law School used the following 3.00 grading system:

A=3; B+=2.5; B=2; C+=1.5; C=1; D=0.5; F=0.

Effective Fall 1975 the Law School converted to a 4.00 grading system:

A=4; B+=3.5; B=3; C+=2.5; C=2; D=1; F=0.

Effective Fall 1997 the Law School used the following 4.00 grading system:

A=4; A-=3.7; B+=3.3; B=3; B-=2.7; C+=2.3; C=2; D=1; F=0.

Effective Fall 2019 the Law School used the following 4.00 grading system:

A=4; A-=3.7; B+=3.3; B=3; B-=2.7; C+=2.3; C=2; C-=1.7; D=1; F=0.

GRADES (Not calculated in grade point average)

IP	In Progress	P	Academic Pass in Pass/Fail Course
L	Audit	FZ	Academic Fail in Pass/Fail Course
--	Grade not yet recorded	W	Withdrew

ACCREDITATION

American University Washington College of Law is fully accredited by the American Bar Association (ABA) and by the Middle States Association of Colleges and Schools (MSA).

Jessica A. Ginsburg
6426 South Street
Falls Church, VA 22042
sardburg@aol.com
703-927-8270

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to strongly recommend Devin Iorio for a clerkship in your chambers.

Devin was a student in my Externship Seminar at the American University Washington College of Law during the fall of 2022. This class was a companion to the externship Devin completed with Chief Judge Beryl Howell from the Federal District Court for the District of Columbia. The seminar required students to reflect -- both in class and in written journals -- on issues in legal practice as well as on their externships. Another key requirement was to design and deliver a presentation.

Devin was one of my most engaged and enthusiastic students during the semester. Devin always contributed actively to class discussions. He often was the first to volunteer a response to a question – which I particularly valued as the seminar ran from 8 – 10 pm, not exactly the prime slot to motivate class participation. His comments were always thoughtful and on point.

Devin's communication skills are very strong. His journals and papers were thoughtful and well written. He was an exceptionally gifted presenter with excellent presence.
Devin has all the attributes to make him an excellent addition to your Chambers' staff. He is collegial and friendly, dedicated and hard working. I strongly recommend him for employment as a law clerk.

Please don't hesitate to contact me if there is any additional information I can provide.

Sincerely,

Jessica A. Ginsburg
Adjunct Professor
American University
Washington College of Law

U.S. Department of Justice

United States Attorney
District of Alaska

James M. Fitzgerald U.S. Courthouse &
Federal Building
222 West 7th Avenue, #9, Room 253
Anchorage, Alaska 99513-7567

Commercial: (907) 271-4724
Email: emily.allen@usdoj.gov

May 25, 2023

To whom it may concern,

I had the pleasure of working with Devin Iorio during his Spring 2023 semester internship at the U.S. Attorney's Office in the District of Columbia. I am one of the many AUSAs around the country detailed to the District of Columbia's U.S. Attorney's Office to prosecute cases arising out of the January 6, 2021, attack on the Capitol. Devin was assigned to our Capitol Siege Section for his semester-long internship at our Office.

Throughout the semester, Devin worked on legal and factual issues to prepare criminal cases for trial, and in between assignments he observed many of the goings-on at the federal courthouse. In a case I was preparing for trial, he helped our team put together trial exhibits based on the data-packed and difficult to read text message extractions of a defendant's cell phone. His final product was polished, accurate, and simple to understand—exactly what we needed to give the jury a useful peek into the defendant's correspondence. In the same case, Devin helped draft a persuasive legal brief, arguing against a defendant's motion to sever his case from the co-defendant he claimed was more culpable. Devin ably combined some existing draft briefs in similar cases to the specific facts of our case and put together a draft that helped persuade the judge that severance was unwarranted.

My work with Devin was entirely virtual, since I am based far away from Washington, D.C. But he was always available, approachable, and enthusiastic. He easily overcame challenges and found ways to plug in and participate. In addition to providing valuable and prompt work, Devin was a positive and welcome presence on our team. He was always eager to contribute and looked for more ways to engage with the work. Devin has a great deal to contribute and I am confident he will find every success.

Sincerely,

Emily W. Allen
Assistant U.S. Attorney

June 16, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my understanding that Devin Iorio has applied for a clerkship. I write to enthusiastically support his application.

Devin was one of my students in "advance Appellate Practice" in the Fall of 2022. The course was rigorous and encompassed a full review of appellate practice and procedure. Devin is an excellent student and achieved an A in the class which required substantial class participation, two writing assignments and oral argument. My worry about hiring new lawyers and clerks is their writing ability. I can attest that Devin's written work was excellent and I am confident that he will be immediately productive for you.

In addition to his academic work, Devin early emerged as a leader in the class. His participation was always inciteful and creative. More impressive to me was his encouragement to his classmates and the suggestions he provided me for the assignments and the class in general. He has already displayed a maturity and professionalism that will serve him well as he begins his legal career.

Devin is a gifted student with impeccable character. Without hesitation I highly recommend him to you.

Please do not hesitate to reach out to me if I can provide any further information.

Sincerely,

Robert J. Hildum Administrative Law Judge District of Columbia Office of Administrative Hearings robert.hildum2@dc.gov 202-747-4392

Devin Iorio

4545 Connecticut Ave NW, Washington D.C. | (631) 487-3696 | di4850a@american.edu

The following writing sample is an appellate brief written for my Fall 2022 Appellate Advocacy class. I was required to draft a brief arguing that summary judgement was properly granted by the trial court because the COVID-19 vaccine mandate imposed by the Mayor of the District of Columbia on District employees was both *ultra vires* and violated the Due Process Clause of the Fifth Amendment. I was required to perform all research for this assignment independently. To reduce length, I have omitted all but the second section of my argument dealing with the substantive due process issue. I would be happy to send the complete document upon request.

ARGUMENT

The Superior Court correctly granted Plaintiffs' Motion for Summary Judgement pursuant to D.C. Civil Rule 56. Order at 16. Appellate courts review grants of summary judgment *de novo*. *See e.g.*, *Joyner v. Sibley Mem'l Hosp.*, 826 A.2d 362, 368 (D.C. 2003). "A motion for summary judgment should be granted whenever the court concludes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* When making this determination, courts must draw all reasonable inferences in a light most favorable to the party opposing summary judgment. *Perkins v. District of Columbia*, 146 A.3d 80, 84 (D.C. 2016).

On appeal, as at the trial court, the opposing party bears the burden of presenting specific facts showing that there is a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 243, 247-48 (1986) ("only disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment."). The opposing party must "show [that] there is [more than] some metaphysical doubt as to material facts." *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Mere allegations or denials are insufficient to defeat a proper summary judgment motion. *Anderson*, 477 U.S. at 248.

II. The Superior Court correctly granted Plaintiffs' Motion for Summary Judgement because the vaccine mandate violates substantive due process by infringing on a fundamental right in the absence of a compelling state interest. Additionally, even if this Court does not find a fundamental right at issue, the Court should still hold that the mandate violates substantive due process because it does not survive rational basis review and is gravely unfair in light of the manner it was implemented and its consequences.

The District's governing bodies are subject to the limitations of the United States Constitution. *See* U.S. CONST. art. I, § 8, cl. 17. As such, these bodies must comport with both the procedural and substantive components of the Due Process Clause of the Fifth Amendment.

See Griswold v. Connecticut, 381 U.S. 479, 504 (1965). Procedural due process "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Alternatively, substantive due process prohibits governmental actions that infringe upon an individual's fundamental rights. *Griswold*, 381 U.S. at 485. Courts examining encroachments on fundamental rights will only uphold government action if it is narrowly tailored to addressing a compelling state interest. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015). To meet the narrowly tailored component of this high bar, courts demand that the state action be the least restrictive means of addressing its compelling interest. *See id.* Courts have also recognized that substantive due process protects individuals from grave unfairness by prohibiting "deliberate flouting of the law that trammels significant personal or property rights." *Tri Cnty. Indus. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997) (quoting *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988)). In such circumstances, government action may be deemed constitutional only if it is rationally related to a legitimate government interest. *See Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). Courts recognize that due process rules, by nature, are not "subject to mechanical application in unfamiliar territory." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998); *see also Moore v. E. Cleveland*, 431 U.S. 494, 546 (1977) ("In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."). Here, Plaintiffs' challenge the substantive effects of Defendants' gravely unfair actions on Plaintiffs' rights, rather than the process by which those rights were affected.

A. Defendants' mandate violates Plaintiffs' substantive due process rights by infringing on their fundamental right to bodily integrity by essentially overriding Plaintiffs' ability to refuse medical treatment in the absence of an overriding justification and medical appropriateness.

The fundamental right to bodily integrity safeguards an individual's ability to refuse medical treatment. *See In re Walker*, 856 A.2d 579, 586 (D.C. 2004); *In re A.C.*, 573 A.2d 1235, 1247 (D.C. 1991); *Feds for Med. Freedom v. Biden*, ("*Feds"*) 581 F. Supp. 3d 826, 832 (S.D. Tex. 2022). Government action that essentially overrides this ability constitutes a violation of substantive due process in the absence of an overriding justification and medical appropriateness. *See Washington v. Harper*, 494 U.S. 210, 221-22 (1990); *Jacobson*, 197 U.S. at 12; *Does v. District of Columbia*, 374 F. Supp. 2d 107, 118 (D.D.C. 2005).

Government action infringes on the fundamental right to bodily integrity when it essentially overrides an individual's ability to refuse medical treatment. *See In re Walker*, 856 A.2d at 586; *In re A.C.*, 573 A.2d at 1247; *Feds*, 581 F. Supp. 3d at 832. In *In re A.C.*, a trial court violated a pregnant and unconscious patient's due process rights by authorizing a caesarean without the consent of the patient or a guardian. 573 A.2d at 1252. The trial court failed to respect the patient's right to bodily integrity by employing an interest balancing approach, rather than "ascertain[ing] what the patient would do if competent." *Id.* at 1245, 1249, 1252 (declaring the constitutional magnitude of the right to forego medical treatment). The court indicated that the viability of an individual's ability to refuse medical treatment is of paramount importance in due process determinations. *See id* at 1248. This principle extends beyond *In re A.C.*'s fact pattern and must be analyzed in all unwanted medical treatment claims. *See, e.g., In re Walker*, 856 A.2d at 586. In *Feds*, a Presidential vaccine mandate was enjoined, in part, because it posed a threat of irreparable harm by creating a "Hobson's choice" for federal employees between "their jobs and their jabs." 581 F. Supp. 3d at 832. The court found that "no legal remedy

adequately protects the liberty interests of employees who must choose between violating a mandate of doubtful validity or consenting to an unwanted medical procedure that cannot be undone." *Id.* Conversely, in *Jacobson*, the Court upheld a statute authorizing municipalities to impose five-dollar fines on adult inhabitants who refused to receive a smallpox vaccination. 197 U.S. at 12. While finding the state action permissible under these circumstances, the Court left open the possibility that future mandates may be rendered objectionable by their context and manner of imposition. *See id.* at 38-39.

Government intrusions on the fundamental right to bodily integrity violate substantive due process when they are not narrowly tailored to address circumstances indicating an overriding justification and medical appropriateness. *See Harper*, 494 U.S. at 221-222; *Jacobson*, 197 U.S. at 12; *Does*, 374 F. Supp. 2d at 118. In *Harper*, a policy allowing for inmates to be involuntarily administered antipsychotic medication was found to be narrowly tailored to the state's intensive interest in promptly treating mentally ill patients and running a safe prison. *See* 494 U.S. at 229, 236. These compelling interests were complemented by safeguards such as the temporary nature of the drugs and reoccurring continuation review hearings. *See id.* Similarly, in *Jacobson*, the Court permitted infringement on the right to bodily integrity in the context of the raging smallpox epidemic. 197 U.S. at 28. The Court likened this liberty limitation to the government's ability to compel military service during periods which pose an existential threat to the nation. *See id.* at 39. Alternatively, the *Does* court found that a policy authorizing elective surgical procedures on behalf of mentally disabled persons "without adequately attempting to ascertain their wishes" was impermissible absent overriding justification. 374 F. Supp. 2d at 108. The court explained that it could not deem the practice

medically appropriate given the non-essential nature of the surgeries and the multiple less restrictive alternatives of achieving the policy's goal. *See id.* at 118.

In this case, Defendants' mandate violates Plaintiffs' fundamental right to bodily integrity by essentially overriding their ability to refuse medical treatment. *See* Pls.' Mot. at 33. As evidenced by Plaintiffs' denied request for a disciplinary requirement exception, the mandate, like the policy in *In re A.C.*, did not allow Plaintiffs to meaningfully effectuate their unwillingness to vaccinate. *See id.* at 8. Although *In re A.C.* represents a brazen overpowering of one's personal rights, the same underlying issues are applicable in circumstances like those in *Feds* and at hand where several factors create the same effect. Similarly, in *Feds*, the mandate forces Plaintiffs to choose between subjecting themselves to unwanted medical treatment or suffering irreparable harm. *Id.* at 35-36. Additionally, non-compliant officers would suffer irreparable harm because they would not only be stripped of their careers, reputations, benefits, and pensions, but would also face significant threats to future employment and potentially their own safety. Order at 3. Current rates of violence against police indicate that officers stripped of badges and guns would face higher levels of personal danger than individuals terminated from other professions who do not have to live among those they previously arrested. *See* Eric Levenson & Josh Campbell, *Shootings of Police Officers Highlight a Rise in Violence & Distrust*, CNN (Oct. 17, 2022) https://www.cnn.com/2022/10/17/us/police-violence-ambush-attack. Being that multiple jurisdictions, including D.C. and Maryland, have prohibited previously terminated officers from subsequent law enforcement employment, non-compliant officers would be required to either abandon the profession and seek alternative work, likely at a significant pay cut, or relocate to a jurisdiction without such prohibitions and hope that none are subsequently enacted. *See* D.C. Act 23-336, Subtitle K; Md. Code Ann., Pub. Safety § 3-212.

These consequences starkly contrast the five-dollar fee levied against vaccination objectors in *Jacobson* and evidence the Hobson's choice that essentially overrides Plaintiffs' ability to refuse medical treatment.

Defendants' mandate violates substantive due process because it is not narrowly tailored, and current circumstances render relevant state interests non-compelling. Order at 4. The interests identified in *Harper* are far less dynamic than the District's interest in compelling vaccination because the prompt medication of mentally ill prisoners is vital to the safe operation of prisons regardless of surrounding circumstances. Conversely, the District's interest has necessarily fluctuated as new information, statistics, and societal trends have emerged. Consequently, the District's near absolute vaccination rate, drastic decline in COVID-19 rates, and rise in telework all cut against a compelling need for such invasive action. *See District of Columbia, DC COVID-19 Vaccine Tracker*, THE COLUMBUS DISPATCH, https://data.dispatch.com/covid-19-vaccine-tracker/district-of-columbia/district-of-columbia/11001/ (Nov. 2, 2022) [hereinafter *DC COVID-19 Vaccine Tracker*]. These circumstances are readily distinguishable from those considered in *Jacobson* to be at caliber with times of war. Considering current conditions and modern medical knowledge, the District's interest in coercing employees to vaccinate is incomparable with the interest in 1905 Massachusetts where the "prevalent and increasing," smallpox virus posed a near existential threat to communities. This modern medical knowledge provides the basis for the multiple less restrictive alternatives to a vaccine mandate that Defendants could have employed to protect community health. Like in *Does*, the presence of less restrictive alternatives like masking mandates, testing for natural immunity, and retaining the test out option indicates that the state action was not narrowly tailored. Defendants' mandate is in fact even more restrictive than the

actions taken in *Does*, *Harper*, or *Jacobson* by virtue of its permanent impact and lack of what effectively amounted to a five-dollar[1] buy-out fee. Thus, Defendants' mandate is neither narrowly tailored nor aimed at a compelling government interest.

B. Even if this Court does not find a fundamental right at issue here, the Court should nonetheless hold that the mandate violates substantive due process because it was implemented through a process that did not consider public concerns, levies substantial consequences on those it affects and is not justified by circumstances that establish a rational basis for such measures.

Government action violates substantive due process when the manner in which it occurs and the consequences it inflicts renders the action gravely unfair in light of the basis for which the action was taken. *See Moore*, 431 U.S. at 503-05; *Romer v. Evans*, 517 U.S. 620, 632 (1996); *Garvey v. City of N.Y.*, 2022 N.Y. Misc. LEXIS 6209 at *20 (Sup. Ct. Oct. 24, 2022); *Silverman*, 845 F.2d a 1080; *Tri Cnty. Indus.*, 104 F.3d at 459; *In re Walker*, 856 A.2d at 586; *Bauer v. Summey*, 568 F. Supp. 3d 573, 593 (D.S.C. 2021).

Government action is considered gravely unfair if it occurs through an improper process and infringes on an individual's personal or property rights by imposing substantial consequences on those affected. *See Moore*, 431 U.S. at 503-05; *Silverman*, 845 F.2d a 1080; *Tri Cnty. Indus.*, 104 F.3d at 459; *In re Walker*, 856 A.2d at 586. In *Silverman*, the court rejected allegations that the District violated due process by denying permission to convert a rental apartment building to condominium apartments. 845 F.2d at 1074. The denial was found constitutional because the plaintiff could not show that state officials acted gravely unfair in a "flouting of the law that trammels significant personal or property rights." *Id.* at 1080. The totality of the circumstances indicated that the District's decision was a product of "confusion" rather than deliberation. *Id.* Under a similar standard, the *Moore* Court invalidated a zoning

[1] Five dollars in 1905 would be the equivalent of approximately $172 in 2023 when adjusted for inflation.

ordinance which impaired liberty interests of extended family members in living together. *See* 431 U.S. at 503-05. The Court reasoned that the ordinance effectively required individuals to choose between maintaining their constitutionally protected property or personal rights. *See id.* No justification could be found that would outweigh the consequences inflicted on "family life-style decisions" through a process lacking the procedural safeguards needed to respect constitutional rights. *Id.* at 512 (J. Brennan concurring); *see also Tri County Indus.*, 104 F.3d at 459 ("[T]he manner in which the violation occurs as well as its consequences are crucial factors to be considered."). In *Walker*, this court struck down a policy authorizing the involuntary administration of temporary antipsychotic medication and emphasized the importance of the process by which policies impose their restrictions in due process determinations. 856 A.2d at 586 (explaining that administration of unwanted drugs can survive challenge only if there are procedural safeguards to ensure consideration of patient interests).

Gravely unfair government action is constitutionally permissible only where it is sufficiently tied to and justified by a legitimate state interest. *See Romer*, 517 U.S. at 632; *Garvey*, 2022 N.Y. Misc. LEXIS 6209 at *20; *Bauer*, 568 F. Supp. 3d at 593. In *Romer*, the Court applied rational basis review and held that an amendment to a state constitution which precluded government action protecting the status of homosexuals was unconstitutional. *See* 517 U.S. at 635. The Court drew a distinction between the amendment's "immediate objective" and its "ultimate effect" when deciding that the amendment and its "severe consequence[s]" are insufficiently related to a legitimate state interest. *Id.* at 626-27. Rational basis review was also applied in *Bauer* to evaluate multiple mandatory COVID-19 vaccine requirements levied on employees and affiliated personnel throughout South Carolina. 568 F. Supp. 3d at 593-94. In finding that a rational basis existed, the court primarily focused on evidence and precedent

relating to the low vaccination rates and surges in variant COVID-19 cases which were present at the time of the courts review. *See id.* at 595-96. In contrast, similar circumstances were addressed more recently in *Garvey* where a New York City vaccine mandate was declared unconstitutional. 2022 N.Y. Misc. LEXIS 6209 at *20-22. The court found that the mandate was not rationally related to a legitimate state purpose because, at the time of review, "nearly 80%" of the city had been vaccinated, the State's temporary state of emergency had lapsed, the vaccine had proven not to provide absolute protection, and even President Biden had declared that the pandemic was over. *Id.* at *19-21.

Defendants' mandate is gravely unfair because it was implemented through an improper process and imposes substantial consequences on Plaintiffs' personal and property rights. Unlike in *Silverman*, Defendants' actions were not the product of government confusion but rather a deliberate process that failed to properly respect Plaintiffs' rights. Order at 11. As in *Walker*, Defendants crafted no procedural safeguards to consider Plaintiffs' interests and in fact actively avoided such consideration by failing to provide an adequate notice and comment period when adopting 6-B DCMR § 2001.2. *See id*. This failure to adhere to rulemaking requirements is especially problematic being that the process occurred just months after vaccines were approved for public use and thus did not consider the many legitimate concerns held by Plaintiffs and others during those early and confusing days. *Id.* at 2, 10. The inadequacy of this process only becomes more damning when juxtaposed with the immense consequences of its product. These consequences are akin to those evaluated in *Moore* in that they create a substantial burden by effectively requiring Plaintiffs to choose between maintaining their interests in continued employment and earned benefits and their personal rights to refuse unwanted medical treatment.

These consequences, combined with the invalid rulemaking process and the vaccine's permanent nature, demonstrate that Defendants' mandate constitutes gravely unfair government action.

Defendants' mandate violates substantive due process because it is not reasonably related to and justified by a legitimate state interest. As made clear in *Bauer* and *Garvey*, the District's interest in compulsory vaccination must be evaluated under the totality of current circumstances. Unlike *Bauer* where the state's interest was evidenced by low vaccination rates and an ongoing surge of COVID-19 variant cases, the District's population is near completely vaccinated and infection rates have plummeted. *See DC COVID-19 Vaccine Tracker*. While the pandemic was undoubtably a unique and daunting period which may have justified more expansive government action, this period has lapsed and thus analysis of government conduct must adjust accordingly. This change occurred gradually but has been acknowledged by government figures like the Mayor who recognized the end of the public health emergency in February 2022, and President Biden who declared the pandemic over in September 2022. Ayana Archie, *Joe Biden says the COVID-19 Pandemic is Over*, NPR (Sept. 19, 2022) https://www.npr.org/2022/09/19/1123767437/joe-biden-covid-19-pandemic-over. Additionally, Defendants' mandate would likely serve to decrease rather than increase public safety by pushing out unvaccinated officers during a period of heightened rates of violent crime and MPD staffing shortages. *See* Compl. Ex. 8. Applying the rationale used in *Romer*, current day factors differentiate Defendants' proffered immediate interest in compelling employees vaccination and the mandate's ultimate effect of unreasonably burdening Plaintiffs. As in *Garvey*, these current circumstances coupled with the vaccine's non-absolute protection do not evidence a reasonable relation between Defendants' mandate and a legitimate government purpose. Hence, Defendants' vaccine mandate violates substantive due process.

Applicant Details

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Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**June 2021**
JD/LLB From	**Stanford University Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011**
Date of JD/LLB	**June 15, 2024**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Stanford Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Marion Rice Kirkwood Moot Court Competition 2023-2024**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Appellate, Prison Litigation**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year student at Stanford Law School and write to apply to serve as your law clerk for the 2024-25 term. I am especially excited to work for someone who values public interest work.

I believe that I have the skills required to assist you in your work. I do well in fast-paced environments, have an incredibly strong work ethic, and have sharp analytical skills. While I do not have legal experience post law school, I do have work experience outside the legal profession. I have worked a wide array of jobs including having worked as a cake decorator, janitor, nursing home assistant, bartender, and busser. I also come from a low-income background and I greatly appreciate the impact and importance that the legal system has in people's lives.

Enclosed please find my resume, references, law school transcript, and writing sample for your review. Professor Anne Joseph O'Connell, Professor Elizabeth Reese, Professor Ron Tyler, and Professor Diego Zambrano are providing letters of recommendation in support of my application.

I welcome the opportunity to discuss my qualifications further. Thank you for your consideration.

Sincerely,

Madison Irene (she/her)

MADISON IRENE

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EDUCATION

Stanford Law School, Stanford, CA — Juris Doctor, expected June 2024

Honors: John Paul Stevens Public Interest Fellowship ($5,000 scholarship for public interest legal work), High Pro Bono Distinction (150 hours of law-related pro bono work)

Journal: *Stanford Law Review* (Volume 76: Articles Committee Editor, Volume 75: Member Editor)

Activities: Stanford Latinx Law Students Association (Co-President), Stanford Law Association (Academic Co-Chair)

The University of Chicago, Chicago, IL — Bachelor of Arts in Psychology, June 2021

Activities: Institute of Politics Pritzker Fellows Program (Team Leader), Mock Trial

EXPERIENCE

MacArthur Justice Center — New Orleans, LA
Law Clerk — August – September 2023

Constitutional Accountability Center — Washington D.C.
Law Clerk — June – July 2023

Native Law Pro-Bono Project — San Francisco, CA
Legal Volunteer — September 2022 – Present

Aide tribal members by working on expungement cases and conducting research on the new legal landscape of the Indian Child Welfare Act (ICWA).

Prisoner Legal Services Pro-Bono Project — San Francisco, CA
Legal Volunteer — September 2021 – Present

Create accessible legal resources for incarcerated persons on common problems they often face, including how to write and file § 1983 claims, engage in custody proceedings, and file for missed stimulus checks.

San Francisco Public Defender's Office — San Francisco, CA
Legal Intern — June – August 2022

Contributed to the representation of indigent defendants charged with felony offenses. Drafted complex pleadings including bail motions, post-trial Romero motions, and motions to suppress. Regularly appeared on the record in court for arraignments, motions, and felony preliminary hearings. Conducted legal research and participated in investigations to build clients' defense strategies.

Gary Comer College Prep — Chicago, IL
Teacher's Aide — December 2017 – June 2021

Taught tenth grade World Literature class to 50 students in a high school on Chicago's South Side.

Illinois Justice Project — Chicago, IL
Policy Intern — June – August 2020

Participated in policy development and implementation meetings with senior staff involving topics such as police brutality, juvenile justice, and bond reform. Wrote anti-child trafficking policy proposals for the Illinois Juvenile Justice Leadership Council. Conducted independent research project evaluating the Cook County child welfare system.

Cook County State Attorney's Office — Chicago, IL
Policy Intern — January – June 2020

Drafted legislation with the potential to change Sex Offender Registration laws to restrict the number of people required to register. Wrote policy report evaluating Domestic Violence Misdemeanor sentencing schemes.

ADDITIONAL INFORMATION

Interests: Enjoy figure skating, painting floral arrangements, and writing letters.

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